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CONVEYANCER'S NOTEBOOK.

Fictions in modern property law.—In a contribution on the present forms of settlment (*ante*, Vol 8, p. 147) it was pointed out that legal fictions in modern law are dangerous and likely to produce further anomalies. In the "Times" newspaper of November 10 it is reported as follows: "Mr. Justice Vaisey yesterday said that an Act of Parliament forbade an advowson to be sold, and asked what was the position if a man owning an advowson died intestate leaving next-of-kin, having regard to the provisions of the Administration of Estates Act, 1925, that all an intestate's property must be sold. It was at the moment, he said, an insoluble problem."

Advowsons became incapable of sale by virtue of the Benefices Act, 1898, Amendment Measure, 1923, that is before the Administration of Estates Act, 1925, so it might be argued that on an intestacy the advowson then became saleable. Such an interpretation obviously does not commend itself to the learned Judge and respectfully we agree. On the other hand there is some authority for saying that a statutory trust for sale is a trust to sell: see *Re Ryder & Steadman's Contract*, [1927] 2 Ch. 62. But, of course, it is doubtful whether Parliament, or even the draftsman of the Act, really expected it to be even normal for realty to be sold when there was an intestacy, much less when the realty partook of such a specialised character as an advowson. In the case of an advowson, of course, Parliament would certainly not have intended to interfere with a measure which was designed to protect presentation to ecclesiastical benefices from being hawked about in the market place. On the other hand, of course, it is not easy to see which of the several beneficiaries, if several there be, should have the advowson allocated to him. The obvious choice falls upon any beneficiary succeeding to any land in the neighbourhood of the incumbency. Even then, how, if at all, can the benefice be valued for the purposes of distribution?

Actually there may be an anomaly on an anomaly. It is an anomaly for realty enjoyed for the equivalent of a fee simple to be unsaleable: this was the first statutory provision. It is obviously an anomaly for realty to be subjected to an imperative direction to sell on intestacy, which is the second statutory provision. Which results

in a third anomaly that there is no intestate succession to realty, since the succession is only to the proceeds of sale which, of course, are personalty: *Re Kempthorne*, [1930] 1 Ch. 268. All which may result, as the learned Judge says, in an insoluble problem. But a statutory trust for sale on intestacy is really a form of legal fiction and the study of legal history should not encourage legal fictions.

Education Act, 1944.—A correspondent has kindly pointed out in connection with section 65 of the Act (see *ante*, p. 34) that a scheme made under the Endowed Schools Acts since 1902 (see Board of Education Act, 1899, and Order made thereunder) will be made by the Board, now Minister, of Education where the scheme relates to endowments held solely for educational purposes (and see section 2 (2) of the 1944 Act). In this connection we may draw attention to the proviso to sub-section 2 of section 2 of the new Act (repeating the 1899 Act) that whether an endowment or part of an endowment ought to be applied for educational purposes is to be determined by the Charity Commissioners. For what is meant by "solely for educational purposes", see *Re Betton's Charity*, [1908] 1 Ch. 205, where it was held to include an endowment for the time being solely applied for educational purposes notwithstanding that it could also be applied thereafter on non-educational trusts.

The learned correspondent raises two other questions that may be of general interest. First, he expresses some doubt whether paragraph 7 of Schedule II does modify paragraph 6 (see p. 33) on the ground that a third party's rights, if any, would be overreached by a conveyance under paragraph 6.

As is customary in dealing with complicated Acts of Parliament it is a matter of opinion in some cases, but we would suggest respectfully that paragraph 6 can only overreach a third party's right if that right is included in the agreement in respect of which paragraph 6 operates. On the other hand, paragraph 7 operates, as it would seem, to exclude from the effect of any agreement made under Schedule II the right of any person who has a "right to the occupation or use of the school premises or any part thereof". Consequently, it is submitted that such a third party's right will not be overreached by a conveyance operating under paragraph 6 unless he has consented thereto. From the point of view of title, presumably, he will be made a party.

Secondly, he raises the problem of the effect of section 86 (2) of the Act on the right of reverter under the School Sites Act and suggests, as we understand him, that this provision of the 1944 Act takes all sting out of the tail of the earlier Act. Actually section 86 (2) seems to us to be a peculiar provision because it appears to be of such a limited character. It operates to confer on the Minister of Education a power to direct that the right of reverter under the School Sites Act, 1841, shall have no effect in relation to certain land in certain circumstances. These circumstances are (i) that a scheme is directed by the Minister under the Endowed Schools Acts; (ii) the scheme contains provision for the sale of land forming

part (presumably not where it forms the whole) of the endowment; (iii) the proceeds of sale shall be applied according to the scheme, and (iv) the Minister is satisfied that *either* (a) the owner of the right of reverter cannot be found *or* (b) the owner has consented *and*, if his consent is dependent on valuable consideration, the amount of the consideration can be found out of the proceeds of sale. We think that in practice there may well be a good many sites which it will be desired to sell for a variety of reasons which an expanded policy of education may dictate, but we hope that recourse to section 86 (2) will not be necessary in all cases in which the School Sites Act applies. Indeed, we feel sure that the section will not cover all the cases, *e.g.*, the village "voluntary" school without other endowment. But another point of some general interest is to know whether a purchaser is concerned in the face of such an order to see whether the Minister *has* satisfied himself.

Constitutional lawyers are becoming accustomed to the official angle that it is not for third parties to question the workings of exalted circles. It is a more novel sphere to bring this into the realm of private conveyancing. Suppose an Order is made in 1945, the land is sold then and is subsequently sold in 1950, is a purchaser in 1950 to assume that all was rightly done because there is an Order? If so, why should he?

Actually this point is not dissimilar from that mentioned on p. 36 (*ante*) about the recording of conveyances sent to the Minister under section 87. As our learned correspondent points out, it is the practice under section 117 of the 1921 Act for the Board to endorse a conveyance with a note, dated and signed, that the instrument is "recorded in the books of the Board of Education under section 117 of the Education Act, 1921", which follows a somewhat similar practice of the Charity Commissioners which in turn is based upon the old practice when deeds were enrolled in the Central Office or in the old Courts. What should not be overlooked, however, is that the origin was different. Court records are open and can be searched; indeed the whole basis of litigation assumed access to the Court Rolls. In the aspect of charities the shifting of judicial functions to Government Departments is of real public interest, but it is happening so gradually that the revolution is not being noticed.

Perhaps we should add that we should welcome any further comments from subscribers. These notes on recent statutes are not intended to be exhaustive in any way. Contributors from the nature of things have often very little time between the issue of the statute and going to press. We feel that something to put subscribers on notice is all that we can attempt in such notes as distinct from the more elaborate articles that form our staple contributions.

Temporary housing.—The Housing (Temporary Accommodation) Act, 1944, is designed to enable the Minister of Health and local authorities to proceed with the erection of temporary houses. The position seems to be that the Minister, with the assistance of the Minister of Works, will arrange for the manufacture of the houses and

for their erection, while it is for the local authorities to agree with the Minister on the terms on which he will supply them : section 1. This agreement is to include arrangements for their removal as well, except that the Minister must remove them after ten years on a written request by the local authority unless the Minister is of opinion that the then housing conditions require them to remain : section 2 (1).

While these temporary dwellings remain on the land they are to be deemed to be fixtures forming part of the freehold : section 2 (1). When removed the structures, fittings and materials are to be held or disposed of for the benefit of the Crown : section 2 (3). In the meantime the local authority will *normally* be required under the terms of the agreement to pay for the use of the erections : section 3 (1), and the agreement may also include terms for the local authority to take part in the management or maintenance of the structure not otherwise inconsistent with the Act or the Housing Act, 1936 : section 3 (2).

The Act then goes on to adapt some provisions contained in Part V of the Housing Act, 1936, to which indeed this Act may be described as " supplemental ". The provisions relating to houses in Part V relates also to the temporary structures under this Act : section 4 (1), and the power of local authorities to acquire land under section 73 of the 1936 Act includes power to acquire sites for the erection of such temporary structures : section 4 (2).

A person authorised in writing by a local authority may enter on any land for the purpose of considering whether any land is suitable for the erection of these structures : section 5 (1). This includes the right to survey, take levels or probe, or bore either for that purpose or for the purpose of making plans or for estimating the value of the land : *ibid.* But if the land is occupied twenty-four hours' prior notice shall be given before demanding admission. Compensation must be paid for any damage suffered in consequence of this power : section 5 (2).

Until the end of 1945 a local authority can obtain authorisation in writing enabling them to obtain possession of any land required for this purpose : section 6. In order to obtain this possession fourteen days' notice must be served on every owner or occupier in order to enable the Minister to consider any representations made within the fourteen days : section 6 (2). The rules governing what constitutes notice are set out in section 6 (3) which includes a notice affixed to the premises if they *appear* to the local authority to be unoccupied.

Apparently the effect of taking possession amounts to an intention to acquire compulsorily and the local authority " shall as soon as may be " after taking possession serve a notice under the Lands Clauses Consolidation Act, 1845, s. 18, but such notice cannot be withdrawn under the Acquisition of Land Act, 1919, s. 5 (2) : section 6 (4). Apart from the provisions of the section itself it is not necessary to obtain the consent of or give notice to any person under the Lands Clauses Consolidation Act, 1845, ss. 84—90 : section 6 (5), but compensation is payable under the Act. The significance of this lies particularly in the definition of owner which is by reference to section 188 of the 1936 Act. Under that Act the owner is the owner of the fee simple or rather the person, other than a mortgagee not in possession, who has the capacity to dispose of the fee simple. Hence

a lessee of a long term who has sub-leased is normally neither an owner nor an occupier.

Once the authority has possession it can not only erect temporary structures and all works necessary for the purpose, but also "the land may be used for the provision of housing accommodation in such structures thereon" and the local authority "may make contracts for the occupation of the land and such structures": section 6 (6). Presumably this includes something in the nature of a tenancy.

Any right of way over the land or other right relating thereto enjoyed by any person, whether by virtue of an interest in land or otherwise (*e.g.*, under licence), will not be exercisable in so far as it would interfere with the use of the land for this accommodation.

There are also provisions for the application of the Act to Scotland and some financial provisions, but these do not appear to affect the private citizen directly.

Infants and Part IV.—Before publication of the last issue but after we had gone to press a learned correspondent sent us the following problem: "In December, 1925, A and B hold freehold property Blackacre as tenants in common. A is an infant and B is of full age. Does it vest in B or do the 'undivided shares' provisions apply? In several textbooks the latter choice is preferred; but I do not know that the first suggestion is not the right one. Indeed that view is taken (or assumed) in the Form 2 in the 'Infants' section of Encyclopædia of Forms and Precedents if I have followed that form correctly."

This point, of course, did not arise in the article on Concurrent Interests, because it concerns the transitional provisions and these were excluded from the article. It may be convenient to deal with the point here because it illustrates a peculiarity. The provisions for the law after 1925 do not seem to be complete: there is no attempt to provide for "all other cases". On the other hand, in the transitional provisions this necessity was present to the mind of the draftsman. In Part IV, paragraph 1 (4) he began "in any case to which the foregoing provisions" do not apply. This is the sub-paragraph which vests the legal estate in the Public Trustee with all the ensuing complications. Hence what was said in the article would not seem to be applicable to this case.

It is, however, equally remarkable that Part III of the First Schedule to the Law of Property Act is entitled "Provisions as to Legal Estate vested in Infant" and in fact deals with most cases but does not refer to the effect where there are undivided shares, at any rate directly. The same is true of the supplementary provisions contained in paragraph 3 of the Second Schedule to the Settled Land Act, 1925. Both the Settled Land Act, Sched. II, para. 3 (5) (6) and the Law of Property Act, Sched. I, Part III, para. 2 provide for the case of an infant *jointly* entitled with another person of full age, but neither seems to contemplate the other case of an infant entitled in common with another of full age, though in practice this must be a much commoner instance. Where jointly entitled the person of full age becomes either the trustee for sale or estate owner under the Settled

Land Act and this would seem to be the obvious and convenient solution. If the parties were entitled in common as for settled land, it would be the trustees of the settlement who would hold on trust for sale: Part IV, para. 3, and cf. Settled Land Act, s. 36.

Nevertheless we do not seem to be able to get away from the fact that the provisions relating to infants are incomplete and the provisions of Part IV purport to cover every case. Other provisions in Schedule I also point to the fact that Part IV was intended to be inclusive of all cases and exclusive of all other provisions: see, for instance, Part II, para. 7 (4). In our view, therefore, we can only express the opinion, with considerable diffidence, that in fact Part IV applies and that normally the legal estate will be vested in the Public Trustee under paragraph 4.

Appointment of new trustees.—A learned correspondent has sent us a most interesting letter arising out of the note in this Notebook for last quarter. It reads as follows:—

"Referring to the interesting letter from a correspondent on the subject of appointment of new trustees in your September issue and your comments thereon, may I venture to put some queries.

Assume: (1) The original trustees of a conveyance of land on trust for sale are all dead and X has a power to appoint new trustees. (2) A, B and C are duly appointed by X as trustees of the conveyance with an express or implied declaration vesting the land in them. (3) The necessity to appoint them (by a separate instrument) trustees of the settlement of the proceeds of sale is overlooked. (4) A dies. (5) B and C sell the land, as they undoubtedly can. Surely B and C will hold the proceeds upon the trusts declared in the settlement of the proceeds, although there was no new appointment of trustees of the settlement.

Assuming the beneficiaries under the settlement want to enforce their rights, must they bring an action against X asking that he may be ordered to appoint B and C trustees of the settlement? What if X is dead?

Sub-section (3) of section 35 of the Trustee Act—as to the endorsing on the settlement a memorandum of the new trustees of the conveyance—says that the conveyance shall be produced to the trustees of a settlement for the purpose of endorsing the memorandum. Does not this indicate that the draftsman had already forgotten sub-section (1)—as to the same persons being appointed trustees of both instruments?

If sub-section (1) is duly compiled with, the settlement should be in the possession of the new trustees of the conveyance, as they would also be trustees of the settlement.

Again, assuming in the conveyance upon trust for sale there is no person nominated to appoint new trustees, but in the settlement of the proceeds X is nominated to appoint new trustees of that settlement. How do you compel the personal representatives of the last surviving trustee to appoint the same persons as X appoints?"

The problems posed in this letter are a warning of the need for careful attention to the Acts and of the danger of statutory interference in this kind of law. The suggestion that the draftsman may

have forgotten in sub-section (3) what he said in sub-section (1) is hardly tenable. That Parliamentary wisdom slept in making amendments, if indeed it did make amendments here, would not be so untenable, but legally we may not suggest it.

Might we suggest that the conveyance might not be in the hands of the trustees because the property was in mortgage? In fact the Act appears to impose a statutory obligation upon any person having the custody of the deeds to produce them for this purpose analogous to the covenant for production.

Our learned correspondent assumes that B and C have a title and can sell. It is probably true that this is so, but is it certainly true? Are A, B and C validly appointed trustees of the legal estate if there are not two deeds and, if they are not, does the vesting declaration operate to vest the legal estate in them? Section 35 is regarded by the experts as being "in accordance with practice" prior to 1926. We have some doubts concerning how widespread the practice was, but the provision may be construed only as directory in which case B and C could sell.

Assuming they could sell, surely the proceeds of sale would be held upon trust for the trustees of the settlement of the proceeds of sale and, if there were none, as in the present case, for the personal representatives of the last surviving trustee who would act until such trustees were appointed. It is against such a trustee presumably that the beneficiaries would enforce their rights.

In practice, however, is it not usually the case that when there is a single deed the trustees are expressed to be trustees both of the land and of the proceeds of sale? The essential problem then again arises whether it is a valid appointment of trustees. As we have said, it is impossible, short of a judicial decision, to answer this problem, though we may think that it is valid.

The last problem posed seems impossible to answer. Obviously the Court could make an order, but could the power of appointing trustees become separated? In the event of two deeds being employed under sub-section (1) and the deed appointing trustees of the conveyance on sale omitting to mention X, would an appointment be valid by anyone other than X? This again presents in our view an insoluble problem in the present state of the authorities. Should the point arise it would probably turn on the actual documents and their precise construction. This might determine that the power to appoint was in fact in both cases in the same person.

Essentially the difficulty arises from another cause. In their anxiety to maintain a separate and simple title to the legal estate from the title to the interests under the trust there is a suggestion, if not more, that the trusts of the legal estate and the trusts of the proceeds of sale are separate or can be separated. Our learned correspondent would, we suspect, suggest that in fact, or shall we say in law and equity, they cannot be separated and are indivisibly one. Juristically we lean in favour of the draftsmen of the Acts. The beneficiaries have no interest in the land but only in a notional trust fund which is personalty. This view did not commend itself very much to the House of Lords in *Baker* v. *Archer-Shee*, [1927] A. C. 844, though this decision is somewhat modified by *Archer-Shee* v. *Garland*, [1931] A. C.

212. Nevertheless from the point of view of conveyancing we doubt whether the two trusts can be divorced readily and the statute produces extremely artificial results, or, should we say, *may* produce extremely artificial results. Once again we must confess we are defeated and to remind readers that the purpose of our contributor's " note " was not to settle, or attempt to settle, disputed questions of title but remind practitioners of the rules to avoid raising them.

CORRIGENDUM.

3 Key & Elphinstone, p. 462, Prec. XLIV, in line 4 : *for* A B *read* C D.

SALE OF AGRICULTURAL LAND AND NOTICE TO QUIT.

By E. O. WALFORD, LL.D., Solicitor.

Owing to the provisions of section 26 of the Agricultural Holdings Act, 1923, it was necessary, even before the commencement of the war, to exercise considerable care when purchasing agricultural land subject to a tenancy, unless the purchaser was indifferent whether the tenancy continued indefinitely.

The first point which has to be borne in mind is that if the vendor has given to the tenant notice to quit before the contract is made, that notice will be avoided by the contract (Agricultural Holdings Act, 1923, s. 26), unless the tenant has agreed before the giving of the notice that it shall be valid notwithstanding the proposed sale (*ibid.*). Incidentally, it may be mentioned that in some cases it is provided by the lease or tenancy agreement that any notice to quit given to the tenant during the tenancy shall remain valid notwithstanding the sale of the holding during the currency of the notice. Whilst it has never been decided whether such a provision is effective, there is nothing in the section which states that the tenant's consent cannot be given before the grant of the tenancy. It only requires that such consent should be given before the contract of sale is made.

WHAT IS A HOLDING?

It should be made clear that section 26 of the Agricultural Holdings Act, 1923, applies only to agricultural holdings let in a certain manner. Reference to certain of the sections may create the impression that where land is let for agricultural purposes those sections necessarily apply, because the term " agricultural holding " is used without any indication that the section applies if, but only if, the tenants holds for a certain minimum period. Examination of the

various definitions in section 57 of the Act reveals the following position :—

(1) " Holding " means land (of the kind specified—roughly agricultural land) held by a tenant (*a*).

(2) " Tenant " means the holder of land under a " contract of tenancy ".

(3) " Contract of tenancy " means " a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year ".

The net result of those definitions is that the provisions of the Act concerning " agricultural holdings " only apply if they are subject to tenancies of the kind mentioned in (3) above. If, therefore, the tenancy is from quarter to quarter, or even for 364 days and then for successive periods of 364 days, it will not fall within paragraph (3) above, and the holding will not be a " holding " within the meaning of the Act : *Land Settlement Association, Ltd.* v. *Carr*, [1944] 2 A. E. R. 126.

The importance of this point in connection with the determination of tenancies of agricultural holdings is seen upon an examination of section 25 (1) of the Act, which enacts that a notice to quit, notwithstanding any provision to the contrary, is invalid if it purports to end the tenancy less than one year after the end of the then current year of the tenancy (with certain exceptions not material here) (*b*).

There is also a further trap in connection with tenancies for two years or more. Such tenancies do not run out when the term expires unless the landlord or tenant has given written notice not more than two years and not less than one year before the term expires. Failing such notice the tenancy will continue from year to year, s. 23 (*c*).

All of the points mentioned above are material in relation to the purchase of agricultural land which is subject to a tenancy which the purchaser desires to terminate as soon as possible.

A War-Time Restriction.

However, since the war began a further trouble has arisen. By the conjoint effect of S. R. & O., Nos. 1774 and 2052 of 1941, where all or any part of an agricultural holding is subject to a contract of sale made since September 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part of it which is given to the tenant so as to expire after December 31, 1941, will be null and void. That provision is, however, followed by a proviso stating that it is not to apply if the Minister of Agriculture and Fisheries consents in writing to the notice to quit, whether before *or after it is given.*

That proviso is, of course, capable of inflicting upon the tenant an injustice, for even if such consent would be void if given after the notice had actually run out (which may be doubted) it can clearly be given whilst the notice is current, even if it has only a few days to run.

(*a*) See also s. 33 of the Act for a case in which the term " holding " has a special meaning.

(*b*) It may be worth noting here that this provision applies to notices given by tenants: *Flather* v. *Hood* (1928), 44 T. L. R. 698.

(*c*) The section does not apply to tenancies granted before January 1, 1921.

However, the Minister of Agriculture and Fisheries has prescribed a form of application for consent, which contains certain notes from which it appears that the Minister will not normally consent to the notice if application is not made within one month after the notice is served. Some such working rule appears to be necessary for the protection of the tenant. It is also stated in the note upon the application form that the Minister cannot act until a contract of sale has been entered into for the sale of the property or the property has been " sold " (presumably this refers to a conveyance without a prior contract—but that point is not clear).

It may be that the Minister *will not* act before contract; but it is certainly not correct that he cannot do so. Nor is it correct, as was suggested in a letter issuing from the Ministry of Agriculture, Block 4, Bickenhall Mansions, W.1, that action cannot be taken before service of the notice to quit. That statement is in direct contradiction of the Defence Regulation which refers to the consent of the Minister before or after the giving of the notice. In that respect I can see no justification whatever for refusal to deal with an application for consent. In fact it would be most desirable that consent should be granted (or refused) before contract and before service of the notice to quit wherever possible. Thus the least trouble would be caused to everyone concerned, except of course, the Ministry officials who are public servants and will in any event be troubled eventually with the matter.

In these somewhat complex circumstances it is perhaps desirable to state what should be done by a purchaser of agricultural land who wishes to follow the line of least resistance, and who is buying it subject to a tenancy from year to year or for a term of years, but wishes to bring the tenancy to an end as soon as possible. The drill would appear to be as follows :—

(1) Contract for sale. The contract would provide that immediately after the exchange of the contract the vendor should serve notice to quit upon the tenant.

(2) It may, of course, be agreed that the contract is only to be binding if the consent of the Minister is forthcoming within a certain period.

In that case the contract would presumably provide that the vendor (or purchaser) shall immediately after the service of the notice to quit apply to the Minister of Agriculture and Fisheries for his consent and use his best endeavours to obtain it, the purchaser being given the right to rescind the contract if such consent is not given within a specified period.

The most important point concerning the technique or " drill " in such cases, is that the notice to quit must be given by the vendor *after* the contract is entered into. Otherwise it will be avoided by section 26 of the Agricultural Holdings Act, 1923, immediately upon the exchange of the contract for sale.

QUASI-CHARITIES.

By Bertram B. Benas, B.A., LL.B., of the Middle Temple, Barrister-at-Law.

The term quasi-charities is, so far as I am aware, not current in the law, but for the purpose of this article it is being employed to describe compendiously the large and increasing number of unincorporated organisations which settlors, testators and donors generally make the objects of their benevolent dispositions by way of trust. The epithet "benevolent" has been applied since we have it now on the highest judicial authority that "benevolent" is not the equivalent of "charitable": see *Chichester Diocesan Fund and Board of Finance* v. *Simpson*, [1944] 2 A. E. R. 60. There may be benevolent dispositions upon trust which are charitable, not by reason of their being generally *described* as "benevolent", as that by itself would be sufficient to take it out of the category "charitable", but because they *wholly* partake of the *nature* of "charitable", while there may be trust dispositions of undoubtedly benevolent character which the law will not regard as "charitable" at all. As Bennett, J., observed in *Re Thackrah*, [1939] 2 A. E. R. 4, at p. 9: "Charity has a technical meaning in the eye of the law. A large number of people would regard as charitable objects which the law does not regard as being so" (*a*). The "Statute of Elizabeth", more strictly cited as the Charitable Uses Act, 1601, and the observations in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, provide criteria by which the "charity" of a gift can be tested, but they are only indicia and the tests based thereon, short of judicial pronouncement upon any particular case, are not conclusive. In application the process is somewhat reminiscent of the history of pleading. Just as a case had to find its appropriate writ, so a "charity" has to find its counterpart in or within the "intendment" of the Elizabethan Statute, or its credentials under *Pemsel's Case* (*supra*). Once the appropriate writ was not extant, recourse had to be made to the approximate "in consimili casu", and the vast collection of decisions as to what are "charities" shows that mere approximation to a charity by reason of analogy to the grouping under the statute or *Pemsel's Case* is like what has been said of one of the noblest of virtues—"not enough".

Supposing the gift upon trust cannot come under the category of the "charitable", benevolent though that gift may be, what does that matter, asks the layman, intent on his benefaction in his own particular way, while the lawyer surveying the situation addresses himself to the questions, what is the vitiating element in the proposed gift which takes it out of the tested grouping of the legally describable "charitable", also what is the consequence of such

(*a*) On the other hand there is a footnote to the passage quoted *infra* from Smith's *Law of Associations Corporate and Unincorporate* where it is observed that: "The technical meaning of the word 'charitable' is much wider than the popular: for an explanation see" the case next cited, at p. 583. Paradoxical as it may seem, these apparently contradictory statements are both reconcilable with the facts.

exclusion, and finally, how can such consequences be minimised if they are unable to be altogether avoided. In *Re Hillier, Dauncey* v. *Finch and Att.-Gen.*, [1944] 1 A. E. R. 480, Vaisey, J., observed (at p. 482) that " in the case of a gift for the benefit of the sick and wounded, which I take to be the class of persons who are suffering from their sickness or their wounds or from both, it will be very surprising for the ordinary man—and I think it would be also very surprising to those who are familiar with the legal definition of ' charity '—to be told that such a gift as that is not charitable because not strictly within the preamble to the Statute of Elizabeth. I think, in the first place, that it is good under that preamble, but I also think that it is clearly within the fourth heading of ' charity ' laid down in *Pemsel's Case*, because it seems to me to be quite clearly a provision for some purpose—not the relief of poverty nor the advancement of education, not the advancement of religion, but for some purpose other than those— which is beneficial to the community. I think it is beneficial to the community because it provides for the relief of persons who need relief and to aid the helplessness of those who require and look for help from their fellow creatures ".

These observations of the learned Judge give a judicial view of the attitude both of the layman and the lawyer to the fundamental difficulty as to the legal envisagement of a " charity " and reveal the fact that there cannot be said to be a definitely objective criterion whereby it can be made certain in advance of judicial definition whether a purpose is " charitable " or not or whether a gift compassing such a purpose by way of trust is legally valid or not. The object may be regarded as a picture and the statutes and the decided cases so many frames. Whether the picture can be fitted into any one of the existent frameworks remains, in all but very obvious illustrations of previous precedents held good, just pure speculation. When such a presumed " charity " cannot be fitted into the framework it partakes of the nature of a " quasi-charity ", quite an invalid purpose by way of trust once the instrument of the gift becomes operative, but a gift still in the tentative stage of proposition may be made either wholly or partially effective, regard being had to the particular circumstances of the case. What then, are the pitfalls and what the safeguards? Two very recent cases indicate the minute scrutiny necessary to decide upon which side of the dividing line between validity and invalidity the proposed gift lies. In *Re Dupree's Deed Trust, Daley* v. *Lloyd's Bank, Ltd.* (" The Times ", Oct. 26, 1944), Vaisey, J., held that a deed of gift to promote annual chess tournaments among the boys and young men under twenty-one in the City of Portsmouth, having regard to that limitation and to the official and educational position of the trustees (the Lord Mayor of the City, the Town Clerk, the Chairman of the Education Committee and the Head Master of the Grammar School and their successors in office as acting trustees and Lloyd's Bank as custodian trustees) created a valid charitable trust. His Lordship said that " If the trust had been for the encouragement of chess at large or in vacuo the limits of charity would have been overstepped ". He directed a scheme for its administration in pursuance of his declaration as to its validity.

In *Re Hales, Deason* v. *Kent* (" The Times ", Nov. 9, 1944),

Uthwatt, J., held that a bequest to encourage by competitions local industries in North Staffordshire, especially with regard to the pottery industry, did not create a valid charitable trust. The case is of interest in respect of the criterion of differentiation between it and *Re Dupree* (*supra*) which was cited on behalf of the Attorney-General in support of the view that the gift was valid as being for an educational object. In the present case, as in the former, persons of standing and in relationship to education were contemplated by the testator in respect of the project, who, as his Lordship remarked, was his own draftsman. The will contained the following terms : " I would suggest that a committee be formed from the members of Stoke-on-Trent Council and Education Committee." There was the same desire to benefit local " residents " and those alone. These elements, however, in this case were not sufficient to overcome the learned Judge's belief that the trusts in themselves " were not for the advancement of education ", and that " the bequest was, therefore, void ".

The classification of charitable categories in *Pemsel's Case* (*supra*), one of the most frequently cited authorities, was based upon the argument of Sir Samuel Romilly in *Morice* v. *Bishop of Durham*, 10 Ves. 522, and the fourth of these categories, trusts for other purposes beneficial to the community, which it might be thought would have been successfully invoked in favour of such a definition as contemplated by the testator, is never a very secure plank upon which to bridge the rapids of these difficult waters, because the cases go to show that its safety can only be tested by the experiment itself and then that is too late to prevent a possible immersion and extinction.

Even on categories there is a conflict of decisions. In *Att.-Gen.* v. *Heelis*, 2 S. & S. 76, it was held that it was not material that a particular public or general purpose in a disposition was not expressed in the Statute of Elizabeth, all other public or general purposes being regarded as charitable. But *Re MacDuff*, [1896] 2 Ch. 451, shows that this view in the former case was too wide. The subjective criterion of the benefactor as to whether a purpose is charitable is not in any way material or decisive : see *Re Hummeltenberg*, [1923] 1 Ch. 243.

Dealing with dispositions which it is safe to assume may not be upheld as " charitable " but partake sufficiently of the nature of the charitable to be considered *in relation* to the law on the subject (that is, what I have termed " quasi-charities "), the first point to have in mind is the fundamental doctrine now firmly established that " a perpetual trust is void for remoteness " (*Tudor on Charities* (4th ed.), p. 58) and that " there seems to be no escape from the dilemma that a perpetual trust must be either charitable or void as a perpetuity " (5th ed., p. 77, where the cases are collected).

Every intending benefactor has first to come to a decision whether he proposes to make an immediate gift to the " quasi-charity " or to do so by way of a continuing trust. In the first case he is not troubled by the old " rule against perpetuities " which provides that " every disposition (except in favour of charity) which tends to make property inalienable for an indefinite period is void " (*Sanger on Wills and Intestacies* (2nd ed.), p. 12, citing *Re Dutton*, L. R. 4 Ex. D. 54). Where a gift is made to such an entity for its general purposes without any restriction as to a particular purpose and the gift is capable of

alienation at any time, then no question of " perpetuity " arises : see *Re Clarke*, [1901] 2 Ch. 110. Its non-charitable nature, in the legal sense, is immaterial. But an entity it must be, otherwise there is no indentifiable recipient : see hereon, *Re Thackrah*, [1939] 2 A. E. R. 4 (a case sometimes referred to colloquially as the *Oxford Group Case*). By an entity is not meant a necessarily incorporated unit, but a cognisable one, and not simply a fortuitous concourse of individuals, however worthy their objects.

Cocks v. *Manners*, L. R. 12 Eq. 574, was the forerunner of many cases which have established these principles, namely that gifts to non-charitable institutions, presumably likely to be perpetual in endurance, are valid if either such gifts are not coupled with trusts preventing the spending of the gifts as the entity desires, either at once or at any time, or if the gifts can be regarded as gifts to the individual members. Therefore, the intending benefactor to a quasi-charity must satisfy himself that both the entity exists as such and that its personnel can either dispose of it at any time or regard it as for the benefit of such personnel individually.

If the benefactor intends the entity to retain the corpus and utilise the interest alone, whether in a certain way or generally, then methods must be employed to overcome the difficulty that, not being a charity in the legal sense of the term, it has ceased to come within the exception to the old rule against perpetuities and is void as being a perpetuity not subject to the charitable exception. By the old " rule against perpetuities " is meant " the rule against alienability " or " the perpetual duration of trusts ". (Note by R. E. Megarry, 60 L. Q. R. 28.) Being a gift to an unexcepted entity it comes under the category of a gift to an ordinary individual or entity on trust, and such trust must comply with the modern rule against perpetuities, or as Gray prefers to distinguish it, the " rule against remoteness " (cited and discussed in *Jarman on Wills* (6th ed.), p. 367, and in the preface by the learned editors, the late Charles Sweet and the late C. P. Sanger. See also 7th ed., by Sanger and Willis, p. 267 *et seq.* *Gray on Perpetuities*, 4th ed. by Roland Gray, section 2. The distinction between " perpetuity " and " remoteness " must be borne in mind in reading the authorities, whatever the terminology used. As observed in *Jarman* (*supra*, p. 267) it was carefully distinguished by Fearne (*Contingent Remainders*, 9th ed. by Charles Butler). The modern rule applies also to charities, for instance, where the gift is conditional upon a future and uncertain event capable of not happening within the period allowed by the modern rule. (" Every executory interest in property which does not vest indefeasibly within a period of one or more lives in being and twenty-one years afterwards is void." *Sanger on Wills and Intestacies* (2nd ed.), p. 16, citing *Cadell* v. *Palmer*, 1 Cl. & Fin. 372.) The modern rule operates on a " quasi-charity " in any case—in the case of a charity, it only operates where the gift for the charity is conditional and contingent as above illustrated. (See cases hereon collected in *Jarman*, 7th ed., pp. 196—198.)

The devices to avoid the modern rule against perpetuities must be invoked to validate the trusts. In Bailey's *Law of Wills* (2nd ed.), p. 130 *et seq.*) the " rules against remoteness " are grouped under four

headings and the categorisation therein set forth prevents a confusion, a confusion which not only mars symmetrical arrangement of survey but has tended to blur exposition of the subject in theory and practice. The categories are (a) the rule against abeyance of the seisin; (b) the rule in *Whitby* v. *Mitchell*, 44 Ch. D. 85; (c) the rule against inalienability (referring back to *Bradley* v. *Leioxoto*, 3 Ves. 324, and also *Re Dugdale*, 38 Ch. D. 176, and *Re Cockerill*, [1929] 2 Ch. 131), and (d) the rule against perpetuities (which the author restricts to the rule under *Cadell* v. *Palmer*, *supra*). In this place we are concerned only with (c) and (d). The position is stated with great clarity thus (*op. cit.*, p. 134): ". . . if property is bequeathed to trustees upon trust to hold it for ever for some specified purpose the trust tends to create a perpetuity, and is therefore usually void. Trusts for charitable purposes are exceptional, but if the purpose is non-charitable, a trust in the nature of an endowment which requires the trustees to retain the property indefinitely and apply its income in perpetuity towards the prescribed purpose is void" (citing *Re Ray*, [1936] Ch. 520, 524). As regards (d) the author observes (p. 135) that this "rule against perpetuities aims at preventing the undue postponement of a gift. Its object is to ensure that a donee will attain a vested interest without undue delay, and that the interest in question will be alienable when he gets it" in contrast with the object of the older rule against inalienability. He adds later (p. 149): ". . . charities are favoured by the rule to a certain extent in that it does not attack a gift over from one charity to another, however remote the contingency may be on the happening of which the second is to benefit." The law is admirably stated in Smith's *Law of Associations Corporate and Unincorporate*" wherein (at p. 79) the author observes: ". . . in conveying property to an association of any kind care must of course be taken that the property shall necessarily vest within the limits allowed by the 'rule against perpetuities' [*i.e.*, the modern rule as regards vesting]; that is merely a rule of ordinary law. But provided the date of vesting conforms to the rule, the mere fact that the association may hold the property for ever does not invalidate the conveyance. But if any attempt is made to bind the corpus of the property by any permanent trust, it will be necessary to consider whether the purpose of the trusts is or is not 'charitable'. In the former case the direction will be held binding; in the latter case the gift will be bad as a perpetuity". The above statements of the law present the material for the diagnosis of the difficulties. There remain for consideration the methods by which these difficulties can be met. Their solution is not so much dependent upon a process of legal therapeutics (for once the dispositions reach the executed stage they have become irremediable) as upon methods of prevention, for here prevention is not a case of being "better than cure" but the only way by which the situation can be saved.

[*To be continued.*]

CONCURRENT INTERESTS IN LAND.

II.

VESTING OF LEGAL ESTATE IN JOINT TENANCY.

Although the new law does not present quite the same difficulty in connection with joint tenancy as it does with undivided shares the apparent simplicity is deceptive. In the first place it should be noticed that a sharp line is drawn between the principles relating to settled land and other forms of joint tenancy. This does not apply in the same measure to tenancies in common.

Secondly the Acts nowhere explicitly state that a grant to two or more persons which can operate to pass a legal estate must create a joint tenancy. This has been assumed generally because section 1 (6) of the Law of Property Act, 1925, provides that a legal estate cannot be created in undivided shares and a conveyance expressed to be in undivided shares operates to create a joint tenancy. This assumption is, no doubt, based upon the belief that at common law any conveyance to two or more persons which did not contain some express provisions constituting undivided shares must have operated to create a joint tenancy. This negative statement of the principle may be correct and for practical purposes it may be and is here assumed to be correct.

Another common assumption among practitioners is that, excepting settled land, a conveyance to persons taking jointly must effect a statutory or express trust for sale. This does not seem to have as sound a basis. The Act nowhere deals exhaustively with the effect of a grant to two or more persons where undivided shares are not involved. Actually the Act concerns itself with beneficial joint tenancy rather than legal joint tenancy. In effect the attitude is, in a manner of speaking, the converse of the method applied to tenancy in common.

JOINT TENANCY NOT BEING SETTLED LAND.

Section 36 (1) of the Law of Property Act, 1925, provides that where a *legal estate* is *beneficially* limited to or held in trust for any persons as joint tenants the same [legal estate] shall be held on the statutory trust for sale as in undivided shares but not so as to sever the joint tenancy. To this provision there is the exception of settled land which excludes the creation of a trust for sale in appropriate circumstances : see *Re Gaul & Houlston's Contract*, [1928] Ch. 689 (discussed hereafter).

Section 36 does not apply to a grant where the beneficial interest is not held in joint tenancy. So, for example, if A grants Blackacre to B and C in fee simple and B and C are the nominees of, say, the Blank Corporation, no statutory trust for sale is created nor, of course, is the land settled land. If the conveyance is expressed to B and C as joint tenants beneficially entitled, notwithstanding the true position, namely that they are trustees, we meet the unfortunate equitable doctrine of notice. Does the Act mean that a statutory trust for sale is created as long as the grant *formally* is expressed to operate beneficially? If so, is notice to the contrary material? If

notice would have a contrary effect, notwithstanding section 2 of the Act, then how can the statutory trust ever arise unless in equity as well as at law the grantees take beneficially?

The following examples may provide the background to the problem where the legal estate is limited to two or more persons. First, Blackacre is limited to A and B in fee simple for themselves as joint tenants beneficially entitled, and in fact they are both at law and in equity beneficially entitled. Secondly, Greenacre is limited to C and D in fee simple for themselves as joint tenants beneficially entitled, but in fact they are trustees for X, the beneficial interest not constituting settled land. Thirdly, Yellowacre is limited to E and F in fee simple as joint tenants and nothing is said concerning the beneficial interest, but in fact they are entitled at law and in equity as joint tenants. Fourthly, Brownacre is limited to G and H in fee simple as joint tenants but without direction concerning the beneficial interest and G and H hold as trustees, the trust not being disclosed.

It is submitted that both Blackacre and Greenacre are held on the statutory trust for sale, because the estate is limited beneficially to A and B and C and D respectively. But if a purchaser has notice that Greenacre is held upon trust he cannot take advantage of the statutory trust because, it is submitted, this notice takes away the effect of the "beneficial" limitation. Yellowacre likewise seems to fall within the statutory trust because in fact the limitation is a "beneficial" limitation notwithstanding that it is not so expressed since the Act does not provide that it shall be limited expressly. But the purchaser would, I think, be bound to satisfy himself that there was a beneficial joint tenancy for the reason given below concerning Brownacre. It is submitted that Brownacre would not in any case be held on the statutory trust for sale. Since the estate is neither expressly nor in fact limited beneficially to G and H it is difficult to see how it falls within the section. Here the absence of notice does not, it is submitted, protect the purchaser. It could, of course, be argued that in the absence of notice the purchaser is entitled to assume that the joint tenants take beneficially, but it is thought that the statutory trust for sale is expressed to arise only in certain cases and this is not one of them. Consequently, it would appear to result that the absence of definition of the nature of the beneficial interest brings the beneficial interest on to the title.

This last, rather puzzling, effect of a statute designed to exclude equities is not quite so startling when viewed in the light of the amendment to sub-section 2 incorporated by the Law of Property Amendment Act, 1926. This provided that nothing in the Act affects the right of a survivor of joint tenants, *who is solely and beneficially interested*, to deal with his legal estate *as if it were not held on trust for sale*. This proviso begins, as it were, with the startling suggestion that a man may hold on trust for sale for himself absolutely entitled, but its effect is limited to the case in which such is solely and beneficially limited, not, it will be observed, appears on the title to be solely and beneficially interested. Hence, in order to benefit by the provision, presumably a purchaser must satisfy himself that the vendor is so entitled. In other words the equities are brought on to the title with all that implies.

Moreover, section 36 brings the equities on to the title in another way. It includes cases in which the legal estate is held on trust for joint tenants. So, if Blueacre be limited to X upon trust for Y and Z as joint tenants, X will hold on the statutory trust for sale, assuming that the beneficial limitations do not constitute settled land. No doubt this provision had in mind that an infant could not hold a legal estate in land, but this precise case is covered by section 19 (2) and a conveyance as joint tenants to two or more persons of whom one is of full age operates to vest the legal estate in the person of full age on the statutory trust for sale. If all the grantees are infants the conveyance operates as a declaration of trust: section 19 (4); and then the operation of section 36 (1) would make the grantor a trustee for sale.

Consequently, it would seem that the beneficial interests are material and must be investigated where either the grant is to persons who take as joint tenants but are not expressed to take beneficially or a sole person takes for persons beneficially interested as joint tenants. The second example is manifestly unsatisfactory because it might be argued that in every case a purchaser must ascertain that a vendor selling as a beneficial owner is not in fact a statutory trustee for sale!

The reason for the last sentence is to be found in the question whether a good title is made by a single trustee holding on the statutory trusts for sale. It is submitted that a good title can be made provided that there is no notice of the trusts. All that is required by section 27 (2) of the Act is that capital money must be paid to at least two trustees or a trust corporation, but that provision does not say that in the absence of fulfilling this requirement the conveyance will be void. It is thought that the conveyance is valid as to the legal estate: cf. *Re Myhill*, [1928] Ch. 100; *Re Wight & Best's Contract*, [1929] W. N. 11. The only question that remains is whether in the absence of notice the purchase money can be required to be paid over again. Probably the sub-section was intended only as a limitation upon sub-section (1) which exempted a purchaser from any consideration of the trusts even though they were disclosed and did not envisage the trust for sale of which the purchaser had no knowledge. It is difficult to guess what actual interpretation is to be put upon the statute with regard to the recovery of the money by, say, two newly appointed trustees for sale, but a purchaser could surely claim relief in equity in some form if he had not been put upon notice of any trusts.

One conclusion that seems to spring immediately from this discussion is the desirability in every case of creating an express trust for sale. This at least excludes all problems arising about notice. Whether, if the beneficial interests are a joint tenancy, section 36 still applies is perhaps not very clear, but it seems to be a case in which the legal estate is held in trust for joint tenants within the meaning of the section so that the benefits derivable from a statutory trust apply. At the same time any express provisions with regard to the express trust for sale, such as a right of pre-emption, may thereby be excluded: cf. *Re Flint*, [1927] 1 Ch. 570; *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; *Re House*, [1929] 2 Ch. 166. It is thought that it is better that the grant should be expressed to be "upon the statutory trust for sale"; as a matter of construction this may have the effect of

preventing the overreaching of any express provisions not wholly inconsistent with the statutory trusts.

Once the joint tenancy has taken effect as a statutory trust for sale no severance of the beneficial interest, which can occur in equity, will affect the legal estate: section 36 (2). Thus, if A and B were joint tenants at law and in equity and A sold his interest to C, the effect would be that A and B would remain joint tenants at law and B and C would be tenants in common in equity. The simplification of conveyancing by the Property Acts will involve this transaction being carried out by an assignment of the proceeds of sale in equity coupled with the appointment by A and B of C as trustee in the place of A under the Trustee Act, 1925, s. 36, and this assumes that B will agree to this course. If A, B and C are joint tenants and if A buys C's interest, there again C must assign his interest to A in equity, which will make A and B tenants in common and A, B and C should join in a deed of retirement under the Trustee Act, s. 39, by which the legal estate is left in A and B as joint tenants on the statutory trusts for sale. Probably in each case it would be at least better, if not imperative, for B to join in the assignment of the equitable interest for the purpose in the one case of appointing C trustee in the place of A and in the other for consenting to the retirement of C in view of the provisions of the Trustee Act, s. 35.

For the like reasons a conveyance to more than four joint tenants within section 36 of the Law of Property Act, 1925, would appear to vest the legal estate in the first four of them, not by virtue of that Act, but because the Trustee Act, s. 34, limits the number of trustees for sale to four. At least it is always, and it is thought correctly, assumed that section 34 of the Trustee Act applies notwithstanding that it is expressed in language applicable only to an express trust for sale.

The consequence of these rules is that once the statutory trust has become effective the legal estate will continue to vest according to the rules for the devolution of trust estates. This includes the provision of section 23 of the Law of Property Act, 1925, that the trust for sale shall be deemed, so far as regards the safety and protection of any purchaser thereunder, to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale. Consequently, a purchaser can always get a good title from two trustees notwithstanding that the joint tenancy has come to an end. But this raises the question whether the survivor of joint tenants is entitled to insist on a purchaser taking a title without the appointment of a new trustee under the amendment of section 36 (2) of the Law of Property Act. Since nothing in the Act affects the right of the survivor to deal with his legal estate, it is submitted that section 42, which renders contractual stipulations void if they exclude certain aspects of trusts for sale, does not apply and that indeed it has no effective operation to this case anyhow. The amendment does not, of course, refer to the vendor's title but only to his right. It is thought, however, that he is not compelled to stipulate for making a title under the amendment. If this is the correct interpretation it seems unfortunate since it has the effect of bringing equities on to the title which would be excluded by a very simple appointment of new trustees,

but in any event it appears to be customary in practice to rely upon the amendment.

To the general principle that devolution will be as for trust estates there is one exception. Section 36 (2), which provides against severance of the joint tenancy, expressly states that the sub-section does not affect the right of one joint tenant to release his interest to the other joint tenants. *Prima facie* this conflicts with what was said earlier about the methods of dealing with assignments constituting tenancy in common. It is thought that it does not, though the provision is difficult to construe. The words " the right of a joint tenant to release his interest " are not strictly accurate of the position under section 36 (1). Any joint tenant, who has a legal estate, has in fact two interests. He has an interest as trustee for sale of the legal estate and an interest as joint tenant in the proceeds of sale : one an interest in realty and the other an interest in personalty : see *Re Kempthorne,* [1930] 1 Ch. 268; *Re Hind,* [1933] Ch. 208. If he proposes to release *both* these interests to the other joint tenants the exemption in sub-section 2 would seem to be applicable, but otherwise it is doubtful and should not be relied upon, because a release by one trustee to another seems to be unusual, if not bad.

Let us conclude this part of our survey by repeating : (i) if the joint tenancy is beneficial it will create a trust for sale unless it is settled land; (ii) if the joint tenancy is beneficial and in settled land separate provisions are made; (iii) if the joint tenancy is not a beneficial joint tenancy the legal estate vests in accordance with the ordinary rules prior to 1926 unless there is some change introduced for some other cause, *e.g.*, the existence of undivided shares under the trust. It is, therefore, by no means true to say that a joint tenancy necessarily implies a trust for sale or a vesting instrument under the Settled Land Act.

Joint Tenants under the Settled Land Act.

The first problem that confronts us with regard to the exception of settled land is the circumstances in which the joint tenancy will be settled land. The problem arose in a fairly acute form in the case of *Re Gaul & Houlston's Contract,* [1928] Ch. 689. There a joint tenancy in fee simple absolute in possession was subject to a rentcharge created by a marriage settlement which was a limitation falling within paragraph (v) of sub-section 1 of section 1 of the Settled Land Act on January 1, 1926. The legal estate prior to 1926 was vested in the joint tenants. The Court of Appeal held, distinguishing *Re Ryder & Steadman's Contract,* [1927] 2 Ch. 62, that the land was settled land at the commencement of the Acts, though not before, and this operated to exclude section 36 of the Law of Property Act.

Settled Land under Settled Land Act, S. 1 (1) (v).

Re Gaul & Houlston's Contract (*supra*) only goes a part of the way in settling the problem. Lord Hanworth, M.R. (at p. 698) expressly disclaimed that he was deciding more than the precise point, namely, that land which became settled land on January 1, 1926, by the operation of the Settled Land Act was settled land for the purposes

of section 36 of the Law of Property Act. This was also apparent in the decision of the Judge of first instance (Clauson, J., as he then was) whose opinion was adopted by Russell, L.J. (as he then was) (at p. 702) who said: "At every moment of time after December 31, 1925, the land here in question was settled land". The ambit of the decision, therefore, appears to be limited to the case where at the date of the operation of section 36 of the Law of Property Act the interest of the joint tenants was subject to other interests constituting settled land. We think, therefore, that if a joint tenancy is created after 1925 in land which is already subject to interests constituting settled land the section must, *prima facie*, be excluded, but if the joint tenancy and the other interests are created at one and the same time it is not so clear.

If A is the estate owner in fee simple of Blackacre conveyed to him subject to but with an indemnity against a jointure rentcharge and he conveys Blackacre to B and C as joint tenants subject to but with the indemnity against the rentcharge, which presumably (*a*) he may do under section 1 (1) of the Law of Property (Amendment) Act, 1926, on the surface section 36 of the Law of Property Act does not apply. This view is not quite so simple as it sounds. The 1926 Act does not say that a conveyance of this character ceases to make the land settled land; what it does say is: "Nothing in the Settled Land Act, 1925, shall prevent a person on whom the powers of a tenant for life are conferred by paragraph (ix) of sub-section (1) of section 20 of that Act from conveying or creating a legal estate as if the land had not been settled land". Consequently both in the hands of A and the hands of B and C (subject to sub-section 7 of section 1 of the Law of Property Act) Blackacre remains settled land. On that principle *Re Gaul & Houlston's Contract* (*supra*) would apply and no trust for sale is created by the Act. This would operate to produce a joint tenancy not held by an estate owner under a vesting instrument and yet not held on trust for sale and this could have very unfortunate results.

It may be argued that the words "as if the land had not been settled land" would have the effect of incorporating section 36 of the Law of Property Act and creating a statutory trust for sale since this would be the effect of the conveyance if it was not settled land. It is submitted that this is the correct interpretation. Nevertheless, the most satisfactory method of dealing with the problem is for the conveyance to B and C to be expressed to be made to them in trust for sale. This will avoid all problems of the character in which the legal estate is held and it is thought must clearly be within the powers conferred by the amendment.

Apart from conveyances made under the 1926 Act and the operation of the transitional provisions, settled land does not present

(*a*) A family charge is clearly within S. L. A., s. 20 (1), para. ix: *Re Carnarvon's Settled Estate*, [1927] 1 Ch. 138; *Re Ogle's Settled Estate*, [1927] 1 Ch. 229, but para. (ix) only refers to a single estate owner in fee simple and there is no similar provision in s. 20 to s. 19 (2) constituting joint tenants together the tenant for life. Nevertheless *Re Gaul & Houlston's Contract* was a case of fee simple owners subject to a family charge and as this was held to constitute settled land presumably the joint tenants must constitute the tenant for life for the purposes of the Act.

A rentcharge that is not a family charge but created for valuable consideration does not prevent the existence of a statutory trust for sale: *Re King's Theatre*, [1929] 1 Ch. 483.

any problem of the creation of a statutory trust because the joint tenants must fall within the scope of the Settled Land Act. Therefore, there remains the other case, namely, when the joint tenancy and the interests, charges or powers of charging under paragraph (ix) of section 20 (1) are created at one and the same time. The simplest example that is likely to be met with is a devise in a will to daughters as joint tenants subject to an annuity in favour of the widow. It is submitted that there is nothing in the decision in *Re Gaul & Houlston's Contract* (*supra*) which really covers this case. Obviously a vesting assent without recitals in favour of the daughters under the Settled Land Act would be complete protection to a purchaser under the Administration of Estates Act, s. 36 (7), and could not be objected to in practice by the beneficiaries. An assent to the daughters in fee simple subject to the rentcharge is not equally free from difficulty, though obviously possible under the 1926 Act and generally desirable in order to avoid the possible necessity of a deed of discharge under section 17 of the Settled Land Act or the intervention of the trustees (normally the personal representatives under the will in such a case) if the land is sold prior to the discharge.

The difficulty in the second case is twofold. First, is the land settled land and would the statutory trust for sale be excluded? Secondly, if the statutory trust for sale exists can it overreach the rentcharge on a sale?

The first point turns upon the precise construction of the words "(not being settled land)", that is, whether the words "not being" relate to the creation of interests anterior in point of time to the instrument creating a joint tenancy. It is submitted that the probable interpretation is that if the instrument creating a joint tenancy makes that joint tenancy subject to interests which would constitute settled land the exception does apply. This brings us back to the unsolved problem whether a joint tenancy subject to a rentcharge but held in fee simple is held on the statutory trusts for sale. We find it difficult. To enable the assent to be made subject to the rentcharge clearly we must treat the land as settled land, but this excludes section 36, and then to hold that because settled land has been dealt with as if it were not settled land a trust for sale is created is very nearly a paradox. But perhaps not quite and we incline to the belief that if and when the question comes before the Court this will be the solution.

On the assumption that the estate owners wish to sell free from the rentcharge clearly the only satisfactory method is to discharge the rentcharge either before conveyance or by joining the owner of the rentcharge to release the land (cf. the effect under *Re Alefounder's Will Trusts*, [1927] 1 Ch. 360). It would seem virtually impossible to overreach it under section 2 (2) of the Property Act, 1925 (see *Re Parker's Settled Estate*, [1928] Ch. 247; *Re Norton*, [1929] 1 Ch. 84), unless a statutory trust for sale is held to have special powers of overreaching not specifically mentioned in the Act but suggested in *Re Ryder & Steadman's Contract*, [1927] 2 Ch. 62. Otherwise the sale must be subject to the rentcharge (with or without an indemnity against it) and operate under the Law of Property Amendment Act, 1926, and for this purpose an express clause is probably necessary in the contract in view of section 42 of the Law of Property Act.

With the problems concerning severance which arise under this class of case we will deal later in connection with severance generally.

Other Forms of Settled Land.

Owing to the old habit of settled estates being sold off subject to but with indemnities against rentcharges and the modern habit of plots being taken in the name of husbands and wives as joint tenants the cases which we have last discussed are probably the most frequently met with in practice of joint tenancy falling within the Settled Land Act. Where land is settled in succession it is rare to meet limited owners holding as joint tenants. Where it does occur it presents on the whole little difficulty.

If the joint tenants take for life and are beneficially entitled to possession they together constitute the tenant for life: Settled Land Act, s. 19 (2). For some extraordinary reason no analogous provision was inserted in section 20, but it is difficult to see how it could otherwise be interpreted. Hence, normally the vesting instrument will vest the legal estate in all the joint tenants but not on trust for sale. It would seem that the death of any joint tenant does not require the execution of a new vesting instrument owing to the doctrine of survivorship.

If any one of the joint tenants is not of full age the other joint tenant or tenants become estate owners until he attains full age: section 19 (3).

Until the execution of the vesting instrument the legal estate remains in its former owner's hands subject to section 13 of the Act. Again he will not hold it on trust for sale, but subject to the obligation of making a vesting instrument and with very slight powers of disposition. The only real difficulty, if difficulty it be, seems to arise in connection with the operation of severance.

Joint tenancy under the Settled Land Act also seems to be distinguishable by reason of the fact that there appears to be no limit to the number of joint tenants. As they are neither trustees for sale nor trustees for the purposes of the Settled Land Act the restrictions on the number of trustees do not apply.

Severance of the Joint Tenancy.

Prior to 1926 severance of an estate in joint tenancy occurred by any act or thing which destroyed one of the unities, such as the unity of title, necessary to the existence of a joint tenancy. The effect of the distinction created by the alternative forms of joint tenancy under the Settled Land Act and upon trust for sale has modified this relative simplicity. In neither case, apparently, is a severance of the legal estate possible so as to create a tenancy in common at law: Law of Property Act, 1925, s. 36 (2). Where there is not settled land a severance can be effected in equity either by one joint tenant giving written notice of his desire to sever the joint tenancy or by doing such other acts or things as would in the case of personal estate have been effectual to sever the tenancy in equity. So, an assignment: *Partriche* v. *Powlet*, 2 Atk. 54; mutual agreement: *Re Wilford's Estate*, 11 Ch. D. 267; and even conduct: *Williams* v. *Hensman*, 1 J. & H. 546

may operate to sever a joint tenancy. Indeed, the importance of these cases is inclined to be overlooked when reliance is placed on a sale by a sole surviving joint tenant under the amendment to section 36 (2) by the amending Act of 1936. It is, however, here relevant primarily to notice that these rules do not apply to settled land, consequently the effect, if any, on the legal estate by severance must be considered separately as the joint tenancy is or is not settled land, and consequently the special case of a conveyance to joint tenants under section 1 (1) of the amending Act, 1926, requires further separate consideration.

(a) Severance of Joint Tenancy on Trust for Sale.

The severance can operate in equity only upon the proceeds of sale. The immediate effect of severance is, therefore, nil. The ultimate effect is simply to maintain the trust for sale after the legal estate has vested in the last surviving joint tenant who then should appoint an additional trustee in order to avoid difficulties in connection with the receipt of capital moneys. It is doubtful whether the amendment to section 36 (2) assists a purchaser from a sole surviving joint tenant in law when the joint tenancy has been severed in equity. Purchaser, of course, includes lessee and mortgagee, and a trustee for sale has limited powers of leasing and mortgaging.

(b) Severance of Joint Tenancy under the Settled Land Act.

Joint tenancy will cease either by death (in which severance strictly speaking does not arise) or by (i) acquisition by one joint tenant of a larger interest, *e.g.*, if a joint tenancy for life and one joint tenant acquires the fee simple in remainder, or (ii) alienation by one joint tenant to a third party, or (iii) surrender by one joint tenant to another. Partition of a joint tenancy may occur, but it is no longer possible for it to be compulsory, so that in effect it will constitute the creation of separate settlements by the mutual conveyances under the principle in *Re Ogle's Settled Estate*, [1927] 1 Ch. 229, and effect will be given to these by a deed of discharge incorporating a new vesting instrument: Settled Land Act, s. 17 (1). It is, therefore, strictly necessary only to the three cases first mentioned.

(i) If one joint tenant acquires a larger interest, whether or not prior to the vesting of the legal estate by means of a vesting instrument, it becomes material to decide whether section 36 of the Settled Land Act applies. If it does the estate owner for the time being must convey the legal estate to the trustees of the settlement upon the statutory trusts for sale and in the meantime holds upon these statutory trusts: Settled Land Act, 1925, s. 36 (1). Parenthetically we may remark that this seems to make it possible for a trust for sale to subsist notwithstanding that the land is subject to a vesting instrument.

It is submitted that section 36 of the Settled Land Act applies so soon as the interest under the settlement is held in common and in possession. The tenancy in common does not arise by means of an assignment, which is the only case affected by section 104 of the Settled Land Act and, therefore, there seems to be no ground of argument that section 19 (2) continues to apply to the circumstances.

This point is most likely to have importance in connection with the doctrine of conversion, since under the trust for sale the interest will be personalty: *Re Kempthorne*, [1930] 1 Ch. 268, and under the Settled Land Act it will be realty: *Re Cartwright*, [1939] Ch. 90. Until the conveyance is made to the trustees any estate owner under a vesting instrument can presumably make a good title under section 110 of the Settled Land Act.

(ii) If one joint tenant alienates his interest to a third party this will create in equity a tenancy in common in equity between the other joint tenant or joint tenants and the alienee, but it is submitted that by virtue of section 104 of the Settled Land Act it will not affect the question of the persons having the powers of the tenant for life and it is immaterial whether or not the assignment took place prior to the date of the joint tenancy falling into possession. Consequently, the estate owners will be the joint tenants including the joint tenant who has alienated his interest. Since the estate owner has powers only all the joint tenants must agree to exercise them or they cannot be exercised. What is more it seems doubtful whether a refractory joint tenant could be dealt with under section 24 of the Act which enables the Court to make an order for the trustees to act on behalf of a tenant for life who has assigned all his interest, but it is possible that the trustees could be authorised to act with the other joint tenants by a "benevolent" construction of the section. Nevertheless, the Court has held already that the section does not apply to statutory owners: *Re Craven's Settled Estate*, [1926] Ch. 985.

So far, therefore, as the vesting of the legal estate is concerned severance of a joint tenancy under the Settled Land Act appears to have no effect. If this is correct the statements contained in the first of these articles (*ante*, pp. 40—42) concerning undivided shares created under a settlement require this modification. Undivided shares can subsist in possession under the Settled Land Act and not held on trust for sale where the tenancy in common is not created by the trust instrument but by an assignment by one joint tenant of his interest. It is submitted that this is not inconsistent with section 36 (4) which provides that an undivided share shall not be capable of being created except under a trust instrument or under the Law of Property Act, 1925. Such an undivided share is not created by the trust instrument but is created under it.

It leaves open, however, the further question, namely, what is to happen when the settlement comes to an end if the undivided shares are still subsisting. For example, when all prior limitations have determined and the estate owners are entitled in equity to the fee simple in common. It would seem that here the estate owners should convey to themselves upon the statutory trusts for sale, joining the trustees to discharge themselves from the trusts of the settlement: Settled Land Act, s. 17 (1) (a). It is suggested that section 36 does not apply to this case at the termination of the settlement any more than it did during its continuance.

(iii) Where one joint tenant surrenders his interest to another, there are two possibilities, either the surrenderee will become entitled in severalty or else this joint tenant will acquire a larger interest than the other remaining joint tenant or tenants. In the first case

the tenant in severalty would probably be entitled to a conveyance to himself since the powers of the surrenderor would disappear under section 105 (1) of the Settled Land Act, although that section speaks only of "the person next entitled in remainder or reversion". Whether a similar result could be achieved where a tenancy in undivided shares is created by the surrender is, perhaps, more dubious. In principle there seems to be nothing opposed to it, but the legislation does not seem to have taken the possibility into account.

(c) SEVERANCE OF JOINT TENANTS TAKING UNDER THE 1926 ACT.

If A holding in fee subject to limitations under section 1 (1) (v) of the Settled Land Act conveys to B and C in fee subject to these limitations as joint tenants and C subsequently assigns voluntarily or by act in the law to D, what then happens? This is, perhaps, one of the most likely problems but it is thought that the Acts provide no satisfactory and clear-cut answer. If the effect of the original conveyance to B and C is to create a trust for sale, then the severance can have no effect on the legal estate: Law of Property Act, 1925, s. 36 (2), and severance can be effected by the means contained in that sub-section. If, however, no statutory trust for sale arises the problem becomes obscure. Does D immediately acquire a concurrent legal interest with B or, if not, does C, on the death of B, become trustee for D and B's personal representatives? If he does, then has C any powers of disposition unless and until the execution of a vesting instrument?

We have already expressed the opinion that the words "as if it were not settled land" must incorporate the statutory trust for sale and this difficulty must emphasise the desirability of such a construction. In the meantime it emphasises the point that conveyances to joint tenants should never be taken under the Law of Property (Amendment) Act, 1926, s. 1.

CONCURRENT INTERESTS UNDER THE LAND REGISTRATION ACT.

Turning from this somewhat bewildering state of affairs in unregistered conveyancing we find that from the point of view of title a registered title to concurrent interests is simplicity itself. Whether the beneficial interests are joint or in common where two or more registered proprietors appear on the register their capacity will be dependent entirely on the restriction, if any, appearing on the Property Register. In the simple case of joint tenants beneficially entitled it is now the practice to enter no restriction at all. In such circumstances the joint proprietors or the survivor of them has complete power of disposition as provided by the Act since there is no contrary entry: section 18 (1).

Where the co-proprietors are entitled beneficially either in undivided shares or as settled land a restriction will appear on the register if the Registry officials are aware of the facts. If such a restriction appears it must be complied with. For example, in undivided shares the restriction normally takes the form of requiring any capital moneys to be paid to not less than two proprietors or a trust corporation. No doubt this is an unsatisfactory restriction since it

does not restrict, *e.g.*, the power of leasing or mortgaging, which under a trust for sale is normally restricted, but in practice such a restriction is treated as equivalent to limiting the proprietors to the powers of trustees for sale. If the land is settled land the restriction will take the more definite form of restricting dispositions to those authorised by the Settled Land Act or the Registrar.

Even in registered land this subject is not left free from obscurity. By section 58 (3) of the Land Registration Act where there are co-proprietors a restriction may be registered that prevents a disposition where the number of co-proprietors is reduced to one : see L. R. R. 213, Form 62. This restriction is not authorised unless it is shown to the Registrar's satisfaction that joint proprietors are entitled for their own benefit or can give valid receipts for capital money or that one of them is a trust corporation : section 58 (3); or that the title is settled land : L. R. R. 213. This provision is, of course, inconsistent with the general rule that the Registrar is not concerned with any trusts : Land Registration Act, s. 74. In practice it seems to work that where the transfer is to joint tenants beneficially, for instance, the usual case of husband and wife, no restriction is inserted. If it is a simple case of tenancy in common, then either the Form 62 restriction is employed or a restriction that on the death of a registered proprietor no further entry may be made without the concurrence of the personal representative of the deceased proprietor : see *Re Buchanan-Wollaston*, [1939] Ch. 738, and 3 K. & E. (14th ed.), p. 427. In all other cases the restriction will be one appropriate either to a trust for sale : see 3 K. & E. p. 568; or for a settlement : see 3 K. & E. p. 559.

It will be appreciated that so far as the legal title is concerned this can be dealt with only by entries upon the register : Land Registration Act, ss. 19 (1), 22 (1). If a transaction could be carried out by a registered disposition and this is not done the transaction may be void : see sections 69 (4), 109. But, of course, in drafting the instruments upon which registration is based some of the problems of unregistered conveyancing may emerge. It does not appear, however, that the difficulties of legal title can arise. So, for example, if a transfer is made to A who, in fact, is to hold the land as part of the partnership land, A will no doubt be registered as sole proprietor without restriction. Title will then be made by him or his personal representatives as if no statutory trusts for sale existed. If any different treatment was intended an application would have to be made for the entry of a restriction which would then determine the limitations of his powers of disposition.

From the point of view of the practitioner acting for the proprietors of the concurrent interest in land it, therefore, becomes merely a question of determining the type of restriction, if any, which should be sought. For the practitioners dealing with the registered proprietors it remains simply requisite to comply with any restriction and this will indeed be forced upon him by the officials at the Registry.

CHARITY AND CHESS.

If life is too short for chess, as a less-known Byron once suggested, it would hardly seem charitable to foster it. However, Vaisey, J., has added to the list of valid charitable gifts a donation for promoting chess tournaments for the youths of Portsmouth (*Re Dupree* (1944), 61 T. L. R. 50). Though no race of mankind is more devoted to the pursuit of sports and games than the English, it has hitherto been the policy of the law to regard gifts for promoting pastimes as being outside the sphere of educational charity (*a*). I have heard the suggestion that it is a form of charity to play with those addicted to chess; but to some persons it might seem that such a concession was merely a display of mental pusillanimity calculated merely to encourage chess players in their vice, and thus to lead to the victimisation of other charitable persons. Perhaps the chief vice of chess is that which characterises quarrels—two persons are needed (*b*).

In *Re Dupree*, Vaisey, J., considered that the game of chess possessed educational value, and evidence was forthcoming that it was included in the curriculum of Wednesbury High School, and was found to be of educational value. The learned Judge thought, having regard to the official and educational position of the trustees (who and their successors in office were always to be the trustees of the trust), that a valid charitable trust had been created.

Vaisey, J., was of opinion that a trust for the promotion of chess at large would not be a charitable trust. However, if chess has educational value it is not easy to see why a "Chess for All" trust should not be charitable, unless it is necessary in all cases to confine the benefits of the trust to poor persons in order that it may rank as a charitable trust. So far as concerns educational trusts it does not seem possible to accept such a view. As I have said, the encouragement of sport is not generally regarded as the object of a possible charitable trust. To the examples given I may add *Peterborough R. Foxhound* v. *I. R. C.*, [1936] 1 A. E. R. 813, where a trust for improving the breed of foxhounds was held not to be charitable. On the other hand the advancement of zoology and animal physiology by means of the Zoological Society are good charitable objects, being educational, and the Zoological Society is a charity. Accordingly, a trust for the upkeep of the Zoological Gardens and in support of its general objects is a charitable trust, *Re Lopes*, [1931] 2 Ch. 130. The test is, it seems, whether there is a benefit to be derived by a substantial body of the public, and not whether those benefited are poor; cf. *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 389; and *Re Pleasants* (1923), 39 T. L. R. 675 (prizes for best-kept gardens and cottages in a parish).

Are there any games, hobbies or sports which have no educa-

(*a*) See *Re Nottage*, [1895] 2 Ch. 649 (prizes for yacht racing); *Re Clifford* (1912), 81 L. J. Ch. 220 (fund to maintain stock of fish for benefit of an angling society). In *Re Nottage* it was plainly said that a trust for the encouragement of sport was not a good charitable trust. Probably chess is not a sport.

(*b*) I might here add in the manner of Boswell: "This clearly shows that the vice of chess is much greater than the vice of drunkenness: for though a man may drink too much, he does not harm his companions by so doing". I am not prepared to support that proposition!

tional value? But does their pursuit always advance the cause of education? The game of ludo is, I believe, referred to contemptuously; but it may be that the education of those who have never played the game has been too conservative. Old persons who continue to play card games are notoriously more alert than those who do not; but the explanation may be that a vice acquired in youth tends to persist throughout life, and not that the playing of games leads to "the advancement of education" or is "beneficial to the community" or otherwise within the ambit of 43 Eliz. c. 4 (as re-enacted). It would be difficult indeed to define the exact boundary line between amusement and vice. Did not a cynic once remark that there are no amusements in England but vice and religion? Whether chess is an amusement, a vice, or a religion I am unable to say. It is enough to record the fact that a particular trust for the promotion of particular chess tournaments for persons under twenty-one has been held to be a valid charitable trust.

Education is not, of course, confined to minors, though the kinds of education which are considered profitable to minors and adults respectively may be different. To constitute a valid charity a gift for the benefit of adults must be for a sufficiently wide body of the public, though it is not very clear whether a similar rule is uniformly applied to trusts for minors. Thus, a gift for school prizes or for fives courts for a school may be charitable, *Re Mariette*, [1915] 2 Ch. 284, and so may a gift for the education of the *children* of employees of a company, *Re Rayner* (1920), 89 L. J. Ch. 369. On the other hand a trust to provide a recreation ground for employees of a company, *Wernher* v. *I. R. C.*, [1937] 2 A. E. R., at p. 491, or to provide a fund for the holiday expenses of a department of a company, *Re Drummond*, [1914] 2 Ch. 90, may not be good charities. But a gift to provide a *public* recreation ground is charitable, *Re Hadden*, [1932] 1 Ch. 133. A gift to residents of a certain town or village, even of certain cottages is beneficial to a sufficient body of the public, *Wernher's Case*, *supra*; but there is a distinction between mere benevolence and charity, and a gift to provide *all* the children at a certain place with sweets is not a "charity", *Re Pleasants* (1923), 39 T. L. R. 675. It has recently been held, most unfortunately, that a gift to provide medals and prizes for competitions to encourage local industries is not a valid charity, *Re Hales*, Times Newspaper, November 9, 1944. It remains to be seen whether that decision will be upheld.

W.

NOTES OF RECENT CASES.

1. *PROPERTY AND CONVEYANCING CASES.*

Charity—charitable or benevolent—legal charity.—Re Diplock, [1941] Ch. 253 (noted *ante*, vol. 5, p. 226) has now been affirmed by the House of Lords *sub nom. Chichester Diocesan Fund* v. *Simpson*, [1944] A. C. 341. The case is of itself not particularly important, because on the whole it follows a well-established line of authority. The testator gave to his trustees his residue to apply as they should think fit to "such charitable

institution or institutions or other charitable or benevolent object or objects in England". Farwell, J., held that it constituted a good charitable trust (see his explanation in *Re Ward,* 110 L. J. Ch. 76), but was overruled by a unanimous Court of Appeal whose decision has now been upheld in the Lords (Lord Wright dissenting). The basis of the decision in the Court of Appeal was that the word "or" was disjunctive and "benevolent" included objects not necessarily charitable. Lord Wright's dissenting opinion was based on the question of construction in which he maintained that "or" should not, on the document read as a whole, be construed disjunctively. Both Lord Macmillan and Lord Wright drew attention to a different conclusion which had been reached in the Scottish Courts on analogous bequests.

The importance of this case, however, lies in two factors. Both in the Court of Appeal, Lord Justice Goddard, and in the House of Lords, Lord Wright, appealed for a modern and up-to-date standard for determining what constitutes a charitable gift. Goddard, L.J., said: "When I find a rule which says that if property is left to trustees to give to charitable and benevolent purposes, that is good, but if it is for charitable or benevolent purposes, it is not, I regard it with some distaste". This observation seems to us to be founded in good reason and good sense. Lord Wright said: "I am convinced that the time has come when modern minds imbued with modern ideas should attempt to achieve a clear workable and comprehensive definition of what is meant by charitable and its cognate terms, such as benevolent, philanthropic and the like. That is a task for the Legislature". But the learned Law Lord also said: "By way of contrast, though the cases are not quite parallel, it may be noted that the common law ever since *Pigott's Case* [11 Co. Rep. 27b] has held that, when in the same instrument there are both legal and illegal conditions, the legal conditions may *prima facie* be enforced whereas the part which is illegal cannot. Courts of equity have been more rigid and have refused to apply anything like their *cy près* doctrine to such cases". Respectfully we may say that this also seems sound reason and good sense. The preference for equity to be found in the Judicature Act was not always to be praised.

But apart from these criticisms, which we hope will be observed in the proper quarters, this case is important for the analysis of the position of gifts to executors to distribute among objects some of which may not be charitable. The law of charitable trusts is said to differ from other trusts because it is not necessary that the objects should be certain so long as they are charitable (cf. note on *Re Gott,* [1944] Ch. 193, *ante,* vol. 8, p. 228), and consequently, where the objects are mixed, charitable and non-charitable, the trust will be void for uncertainty, because the amount to be devoted to non-charitable objects is not ascertained.

Actually gifts to non-charitable objects fail normally from one of two causes, namely, either the gift is one of income and not capital with unfettered right of disposal and this fails for "perpetuity", or alternatively it is void for uncertainty. It will be observed that these reasons are quite different and, if analysed, even inconsistent. It is not possible in a brief note to deal adequately with these points, but it should be pointed out that "perpetuity" in this connection has nothing to do with the Perpetuity Rule which forbids the too remote vesting of contingent interests, and uncertainty here depends upon a supposed application of the principle "*delegatus non potest delegare*", at least in many cases. We will hope to return to the question in an article.

Charity—educational trust for education of lawful descendants of three specified persons.—In *Re Compton,* [1944] Ch. 378, a testatrix had bequeathed property to trustees upon trust to invest under a perpetual trust

for the education of the lawful descendants of three named persons. It was argued on behalf of the next-of-kin that such a trust was void for perpetuity or uncertainty because it was not a valid charitable trust since it contained no public element, being confined to members of a particular family. With this view of the matter Cohen, J., would have been disposed to concur had it been free of authority, but it had been repeatedly held that a gift for the relief of poverty may be confined to members of a particular family and still be charitable: see *Att.-Gen.* v. *Duke of Northumberland* (1877), 7 Ch. D. 745 and cases there cited, and a similar view seems to have been taken of educational charities in *Att.-Gen.* v. *Sidney Sussex College* (1869), 4 Ch. App. 722.

A comparison of this case with *Chichester Diocesan Fund* v. *Simpson* (*supra*) brings out clearly the unscientific and even incoherent condition into which the law of charities has fallen for want of any adequate statement of first principles such as is generally to be found in the Common Law. The notion that charitable trusts were public trusts and that public trusts were charitable trusts, which presumably is at the bottom of certain peculiar rules relating to charities, has become meaningless. On the other hand, when trustees are given by will a discretion to select between objects obviously beneficial to the community (or public), as presumably any "benevolent" object must be, the gift will fail for "uncertainty". Not that there is more uncertainty than in the case of a power of appointment in favour of any person other than the donee or one of the other wider powers, but presumably because *in such a case* the trustees must not be given discretion. As we have noted above the matter requires closer investigation.

Actually this case, and earlier decisions such as *Att.-Gen.* v. *Sidney Sussex College*, 4 Ch. App. 722, bring the position of education more or less into line with relief of the poverty of the settlor's poor relations: see *White* v. *White* (1802), 7 Ves. 422. The question undoubtedly does arise whether a limited class should be within the scope of a "public" as distinct from a "private" trust as charitable trusts are usually described. The point may be taken as an illustration of the fact that charitable trusts are not necessarily "public" in any real sense as being open to and directly benefiting the public. Actually a gift "for public purposes" would normally be not only not charitable but void: see *Blair* v. *Duncan*, [1902] A. C. 37; *Houston* v. *Burns*, [1918] A. C. 337. On the other hand, "public objects" associated with specifically charitable objects might be construed *ejusdem generis* and so be valid: cf. *Re Bennett*, [1920] 1 Ch. 305, at any rate where associated with a particular locality.

Charity—education of a class—descendants of specified persons—chess.—Another case, which illustrates this peculiarity is *Re Dupree's Trusts*, [1944] 2 A. E. R. 443 (see article, *ante*, p. 84) where Vaisey, J., held that a gift to encourage the playing of chess among young people of a certain locality was charitable. The learned Judge laid stress upon the fact that chess was an educational instrument among young people according to the evidence before him and that the trust was limited to a particular area. Quite why it is more charitable to encourage education in a limited area we are unable to see without doubting the learned Judge's interpretation of the authorities.

Assets under a dissolution of partnership—whether charge on land—Charitable Uses Act, 1735.—*Re Nicol*, [1944] 2 A. E. R. 181, is a useful case as showing the peculiar position of partnership assets and as a warning

that the old law of charities may rise up still to confound us. Actually there is nothing really new in this decision which mainly turns upon the construction (i) of the testator's will and (ii) of an agreement for dissolution of partnership. The Court of Appeal held upon the construction of the will that the testator, who died in 1877, bequeathed a sum of £40,000 to be paid out of such of his assets as were available to meet charitable bequests in 1877, but such payment was not to be made until the death of his widow, who in fact survived him for sixty-five years. In so holding the Court of Appeal were construing the will according to *Re Hamilton,* [1896] 2 Ch. 617, and not according to *Re Corcoran* (1892), 62 L. J. Ch. 267. As the learned Master of the Rolls pointed out, to hold otherwise was to give the trustees a discretion, by investing the whole of the residuary estate in realty, to have defeated the charitable bequest altogether: see *per* Lindley, L.J., in *Re Hamilton,* at p. 622.

Having so held it then became material to decide whether under the agreement some assets of the testator formed part of partnership assets which comprised *inter alia* a mortgage of land. Under the Charitable Uses Act, 1735, any bequest of any charge or incumbrance affecting land was absolutely null and void. It was held in *Ashworth* v. *Munn* (1880), 15 Ch. D. 363, that a bequest of partnership assets, part of which consisted of land, was the bequest of an interest in land and so void, simply because the partner's share constituted a charge or incumbrance on the land. Furthermore, a legacy payable out of personalty and of the proceeds of sale of land is an interest in land and there can be no apportionment: *Brook v. Badley* (1868) 3 Ch. App. 672.

Actually this is a strong case because what part of the assets of the partnership was realty was doubtful (see the dissenting judgment of MacKinnon, L.J.) and the Act was held to apply on the principle that the agreement constituted not only a charge upon the shares of the continuing partners but also on the partnership assets.

It is of course no longer possible that this particular problem should arise in deaths after 1891 because of the Mortmain Act, 1891. What may prove interesting is whether today partners can have an interest in land, since they hold on the statutory trusts for sale as undivided shares, at least where the land is vested in two or more partners: *Re Fuller's Contract,* [1933] Ch. 652.

Mortgage—no covenant to pay interest—liability to pay interest.—*Mendl* v. *Smith,* 112 L. J. Ch. 279, arose in somewhat peculiar circumstances. The mortgage recited that the money (£17,194 17s. 6d.) was lent "upon having repayment thereof with interest thereon secured in manner hereinafter appearing", but neither the covenant to repay nor the proviso for redemption contained any reference to interest. Simonds, J., held, following *Ashwell* v. *Staunton,* 30 Beav. 52, where the facts were practically identical, that interest was payable and directed that the interest should be payable at 5 per cent.

In Fisher and Lightwood's *Law of Mortgages* (7th ed., at p. 737) (referred to by Simonds, J.) the law is stated as follows: "Contrary to the general rule as to loans, interest is payable upon mortgage debts, even though it is not expressly reserved, and although the mortgage is only equitable, including a charge by mere deposit of title deeds, and generally where the principal sum is a charge on specified property. Where, however, the contract expressly provides for reconveyance upon payment of the principal, interest will not be payable, unless the deed contains elsewhere an express or implied agreement for payment of interest". The learned Judge adopted this view of the law and, therefore, it is to be observed that the recital

operated to give an express or implied agreement to pay interest. Generally, of course, where the operative part is clear and unambiguous in a deed the recitals do not govern the operative part, but this appears to be a case where the recital can operate as a covenant to pay interest, since no other mention is made in the operative part of the deed of any such covenant.

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2. *WILL CASES.*

Two wills on one day—no proof of order of execution—neither will admitted to probate.—In bonis Howard, [1944] P. 39, involved another interesting point beside that of *commorientes*. The father of the family killed in the catastrophe had on the same day executed two wills, one of which was designed to give his estate to his wife and the other to his son; both wills contained a revocation clause. There was no evidence to prove which will was first executed, and Henn Collins, J., held that neither could be admitted to probate but that both operated to revoke earlier wills and consequently the father died intestate.

Actually the son was illegitimate and, therefore, the question arose whether he could inherit on the intestacy of his mother for which he had to survive her. Henn Collins, J., held that as the mother was *commoriens* with her husband and could take nothing from him the son could take nothing from the mother under section 9 of the Legitimacy Act, 1926.

Gift "on attaining twenty-one"—contingent legacy—intermediate gift to parent for "advancement and education".—Re Rogers (noted *ante*, vol. 8, p. 231) has been affirmed by the Court of Appeal, [1944] Ch. 297. A legacy to an infant "on his attaining the age of twenty-one years" was followed by a proviso to pay the income to the infant's mother for his "advancement and education". The Court of Appeal held that the proviso did not constitute the mother a trustee of the income for the infant pending his majority. Consequently, as the infant was not entitled to the income, this did not convert what was a contingent interest into a vested interest.

In the judgment of the Court the learned Master of the Rolls pointed out that it had not been the practice of the Court to require a parent to keep an accurate account of the sums paid for maintenance and education and cited as authority Lord Cranworth in *Browne* v. *Paull* (1850), 1 Sim. (N.S.) 92. The learned Judge came to the conclusion that for this purpose no distinction could be drawn between maintenance and education and advancement and education; if "advancement" had "a capital flavour" it also had "an income flavour".

Will—general legacy of specified stock—stock required to be transferred to Government—ademption.—In *Re Borne,* 113 L. J. Ch. 159, the question was whether a legacy of £300 Union of South Africa Stock, 1945—1975, was valid. The Government had required all such stock to be transferred to them, but owing to her state of ill-health the testatrix had not, in fact, executed any transfer. Vaisey, J., held that (i) the legacy was a general and not a specific legacy; (ii) consequently the fact that the testatrix still had the stock was irrelevant; (iii) as a general legacy it constituted a direction to buy such stock or pay the value thereof, but such stock could not be bought; and (iv) that as the legacy should be maintained it was a valid gift of the value of the stock. The learned Judge pointed out that this case

was different from that of a gift of shares in a company which had ceased to exist. The stock had not ceased to exist, but it was temporarily impossible to purchase it owing to Government regulations. The learned Judge, therefore, directed the personal representatives to pay over to the legatee the sum which the Government paid for the stock.

Revocation and revival—absence of express confirmation—Wills Act, 1837, s. 22.—Where a will has been revoked it cannot be revived except by re-execution or by a codicil properly executed and showing an intention to revive the will. In *Re Mardon,* [1944] P. 109, the problem was whether a codicil, which made alterations in an earlier will by specific reference but did not confirm expressly the old and revoked will, did operate to revive the old will to the exclusion of later wills. The codicil was drawn by a layman and an affidavit was before the Court from which the learned Judge (Barnard, J.) drew the following conclusions: "The evidence in this case is clear and undisputed, that the draftsman applied his mind to certain provisions of the first and revoked will, and, therefore, at any rate in part, revived that will, and when you read paragraph 3 of [the draftsman's] affidavit and then compare the first revoked will with the codicil, it seems clear to me that the draftsman did not apply his mind to either the residuary bequest in the first will which is contained in clause 4, or the revocation clause which is contained in clause 7 of the revoked will, and as there is no clause in this codicil confirming the revoked will, nor does there appear on the face of the codicil any words showing an intention to revive either of those clauses, I do not think that either of those clauses of the revoked will can be admitted to probate, but I do find that the codicil revived the first will . . . with the exception of clauses 4 and 7 and reading the codicil and the provisions of the first will which are revived, together, there is no revocation clause and no bequest of residue, and, therefore, I think there can be no question that the last will, which was never, in fact, revoked, must also be admitted to probate".

Although the learned Judge came to the conclusion stated above he had said earlier that it was obvious on the facts that when the testatrix asked for the codicil to be prepared she had obviously forgotten two other and later wills, one of which was in the result admitted to probate. The general principle which was being applied was that laid down by Hannen, P., in *In the Goods of Dyke* (1881), 6 P. D. 205, where again references to a will in a codicil revived the will. The learned Judge distinguished *Goldie* v. *Adam,* [1938] P. 85, on the ground that in that case it was held that there was no evidence that the draftsman of the codicil had applied his mind to the provisions of the will to which it was expressed to be a codicil. It will be observed, however, that the principle of this case was also followed by the exclusion of clauses 4 and 7 of the will on the ground that the draftsman of the codicil had never applied his mind to them.

Execution by signature on envelope—validity.—In *In the Goods of J. C. Mann,* [1942] P. 146, Langton, J., with considerable reluctance departed from the usual rule that the Court will not admit to probate two separate pieces of paper together representing a will unless in some way they are physically attached. There was some authority for his so doing in *Lewis* v. *Lewis,* [1908] P. 1, where Bargrave Deane, J., had admitted to probate two pieces of paper held together by the testator's thumb at the time of execution

and attestation and in *In the Goods of Almosnino* (1859), 1 Sw. & Tr. 508, where the testator had signed and the witnesses had attested on an envelope enclosing the will. In *In the Goods of Mann,* Langton, J., admitted a will to probate when the witnesses had attested on the will, but the only signature was on the envelope which subsequently enclosed the will and, as Langton, J., pointed out, this went a good deal further than *In the Goods of Almosnino* (*supra*). In *In the Goods of Bean,* [1944] P. 83, a somewhat similar problem arose where the attesting witnesses had attested a printed will form in the correct place but the testator had not signed there. He had endorsed his name on the back and also written his name and address and that of the executrix on the envelope. Hodson, J., held, distinguishing *In the Goods of Mann* (*supra*), that the will could not be admitted to probate since it had never in fact been signed. The name was not a signature but a description. The learned Judge added that had the name been a signature he would have admitted it to probate as indistinguishable from the earlier case.

It should be pointed out that the learned Judge came to the decision he did on the basis of the evidence before him. He came to the conclusion on that evidence that the omission to sign in the appointed place was purely accidental and that the name was written on the back and envelope for the purpose of identification.

Will—construction—all other contents of my home or at the bank—choses in action—cash.—Re Abbott, [1944] 2 A. E. R. 457, though a decision of the Court of Appeal, does not appear to be likely to afford much guidance upon construction except as a warning against construing a phrase apart from its ordinary meaning. The testatrix had directed "all other contents [except clothes previously specifically bequeathed] of my home or at the bank to be sold and the proceeds divided". There was cash at home, deposited in a deed box at the bank and in a nursing home and there were also certain choses in action including money on current account, shares and stocks. Cohen, J., had held that all these forms of property passed. The Court of Appeal held that the actual cash did pass, notwithstanding that it could not be sold, because it would normally be among the contents of the home, but that stocks and shares whether at home or at the bank could not be included in the gift. This decision was arrived at by holding in the first place that the gift was a specific legacy and not a residuary gift. Hence it was necessary to construe it to include only those articles of property which could be regarded as having a locality at home or at the bank and hence, apart from a contrary context which was not found, would not include choses in action. Cohen, J., had succeeded in holding otherwise by construing the words to mean "all other contents whether at my home or at the bank", but this construction did not commend itself to the Court of Appeal.

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3. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Rent Restrictions Acts—dwelling-house used in part for the letting of lodgings.—In *Vickery* v. *Martin,* [1944] K. B. 679, a landlord raised again the question whether premises constitute a dwelling-house if, though the tenant does dwell there, the main or substantial user of the premises is

for a business purpose, such as the letting of lodgings. The Court of Appeal confirmed the view stated in the text-books that the premises are a dwelling-house if let in any degree at all as a dwelling-house, though the main user may be for business purposes.

The cases cited by the Master of the Rolls in his judgment (in which MacKinnon and Luxmoore, L.JJ., concurred) were *Epsom Grand Stand Association* v. *Clarke* (1919), 35 T. L. R. 525; *Colls* v. *Parnham,* [1922] 1 K. B. 325; and *Hicks* v. *Snoop* (1928), 93 J. P. 55. Where words have been used in any of the cases, such as by Shearman, J., in *Colls* v. *Parnham,* suggesting that the user for dwelling purposes must be "substantial" in order to render the premises as a whole a dwelling-house, that is erroneous. If in fact the premises are the house in which the tenant lives, then they are a dwelling-house. The conjoined business user, however extensive, is then to be ignored—see the plain words of section 12 (2) (ii) of the Act of 1920, "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes", repeated in the same words in section 3 (3) of the Act of 1939. The Court of Appeal construed this provision exactly as printed and refused to read into it any limitation of the part referred to to a "non-substantial" part.

This case may be related also to the cases rejecting the doctrine of dominant user, such as *Waller & Son* v. *Thomas,* [1921] 1 K. B. 541, and *Brakspear* v. *Barton,* [1924] 2 K. B. 88.

(Woodfall, 24th edition, p. 347; Rent Restrictions Guide, p. 16.)

Rent Restrictions Acts—increase of rent up to the amount of the standard rent.—Two recent decisions of the Court of Appeal on this difficult question illustrate the complexity of the subject, but have now, it is thought, considerably clarified the law for the guidance of practitioners.

The two new decisions are *Oxley* v. *Regional Properties* (1944), 60 T. L. R. 519, and *Capital and Counties Properties* v. *Butler,* [1944] K. B. 730. In order to appreciate these cases it is necessary to refer first to several of the earlier decisions.

The principle that if a house is let for a lower rent than the standard rent the landlord is entitled, at any time when it would be permissible for him under the contract of tenancy either to determine the tenancy or raise the rent, to increase the rent up to the amount of the standard rent, was established by *Phillips* v. *Copping,* [1935] 1 K. B. 15. Subject to that power on the part of a landlord, a tenant who holds over as statutory tenant after the termination of his contractual tenancy does so on the terms of his original contract of tenancy so far as consistent with the Acts (Act of 1920, s. 15 (1)) (a minor point settled by *Oxley* v. *Regional Properties* is that the "original" contract of tenancy referred to is the contractual tenancy under which the tenant was holding immediately prior to the holding over which gave rise to a statutory tenancy). One of the terms of the original contract of tenancy may enable the tenant to make a deduction from his rent on certain terms or for a certain period. In *Bryanston Property Co.* v. *Edwards,* [1944] K. B. 32, the Court of Appeal held that a clause in the agreement permitting the tenant to make a certain deduction from his rent for the period of the war was a term of the original contract of tenancy which was carried over under section 15 (1) into the statutory tenancy. This case has already been noted in *The Conveyancer,* Vol. 8, p. 175. The *Bryanston Case* was followed shortly afterwards in *Tedman* v. *Whicker,* [1944] K. B. 112, noted in *The Conveyancer,* Vol. 8, p. 177.

Now in *Capital and Counties Properties* v. *Butler* a tenancy agreement for one year ending in November, 1941, contained an option for the tenant to continue subject to one month's notice by either party at a rent of £95 a year during hostilities and £114 thereafter, the standard rent being £120. It was held by the Court of Appeal that the provision as to a rent of £95 during hostilities was a pure reddendum and nothing else; that it merely meant that if this monthly tenancy should continue during that period the rent should be £95; but that upon giving the requisite month's notice the landlord could increase the rent up to the amount of the permitted rent under the principle of *Phillips* v. *Copping*, the *Bryanston Case* being distinguished on the ground that the tenancy agreement contained in that case a separate and independent clause permitting the deduction to be made during hostilities as one of the terms of the tenancy.

Oxley v. *Regional Properties* was, on the other hand, held to fall within the principle of the *Bryanston Case*. Here the tenancy agreement provided for a monthly tenancy after the expiration of the initial term of three months, one of the terms of this agreement being a bonus for prompt payment which the tenant could retain out of his rent if he paid within fourteen days of the date the rent fell due. The landlord determined this agreement by notice to quit and then sought to increase the rent up to the amount of the standard rent, which was the rent reserved by the agreement without taking the bonus into account. It was held that the provision in the contract giving the tenant the benefit of the bonus was a separate and independent term of the contract of tenancy, and was imported into the statutory tenancy under section 15 (1) of the Act of 1920. The Master of the Rolls, in following and applying the *Bryanston Case*, conceded that the distinction between this and *Capital and Counties Properties* v. *Butler* was a fine one, but based the distinction upon the fact that both in the *Bryanston* and in the *Oxley Case* there was a separate clause in the agreement permitting the tenant under certain circumstances to make a deduction from his rent. This was a clause distinct from the reddendum, and is carried over into the statutory tenancy. The reddendum itself is only continued into the statutory tenancy until such time as the landlord chooses, in cases such as these, to make the increase of rent which is necessary to bring the rent reserved by the reddendum up to the standard rent. The distinction is fine, but logical, and seems now to be rendered clear by the reported cases on the subject.

(Woodfall Supplement No. 4, pp. 7, 17; Rent Restrictions Guide, p. 34.)

Tenant contracting as agent for undisclosed principal—admissibility of evidence to prove the agency.—In *Danziger* v. *Thompson*, [1944] 1 K. B. 654, the written tenancy agreement described one of the defendants as the "tenant", but the landlords now sought to introduce evidence that she had entered into the agreement on behalf of her father and mother, who were joined as co-defendants. It was objected that proof that she had entered into the agreement as agent would contradict the description of her in the agreement as tenant, and was therefore inadmissible.

Lawrence, J., in rejecting this argument, held that the description "tenant" no more negatives agency than would the description "contracting party". He defined the "tenant" as meaning the person who by the contract becomes liable to the obligations and entitled to the rights which the contract allots to the tenant, and held that such a description is not inconsistent with a person so described being an agent. Lawrence, J., was following the reasoning of Lord Haldane in *Fred Drughorn* v. *Rederiaktienbolaget Transatlantic*, [1919] A. C. 203, a case where a charterparty

was entered into by a party as agent, and pointed out that when Lord Haldane drew a contrast in that case between a charterparty and a lease he was thinking of the position of the lessor, who does imply when he grants the tenancy that he is possessed of a proprietary interest in the property entitling him to do so. Evidence that he was merely an agent would, said Lord Haldane, contradict the written contract.

This case invites comparison with *Sowler* v. *Potter*, [1940] 1 K. B. 271, which affords authority for the proposition that in the case of a lease the consideration of the person with whom the contract is made may be a vital element in the contract, in which case, if there is a mistake on the part of the landlord as to the identity of the person with whom he is contracting, the lease may be void *ab initio*. Consideration of this case seems to suggest that in the class of case where the identity of the tenant is of vital importance to the landlord (and this is frequently the case with some types of property, the landlord taking care to protect himself with a suitable restriction upon assignment or sub-letting) the doctrine of *Danziger* v. *Thompson* must be applied with caution. After all, Lawrence, J., was only concerned in that case with the question whether the mere word "tenant" of itself excluded the possibility of agency. He did not address his mind to, and was not called upon to deal with, the possibility that other circumstances might in a different case exclude the possibility of the tenant validly entering into the contract as agent for an undisclosed principal. Where the circumstances indicate that the actual identity of the tenant is vitally important to the landlord, *Danziger's Case* must not, it is thought, be relied upon for any wider proposition than is actually there stated. Otherwise the landlord who is anxious to let, say, an hotel, to a respectable and responsible tenant only, and examines his proposed tenant's credentials carefully from that angle, would have no protection against the menace of the undisclosed principal. A point to note in this connection is that in *Danziger's Case* it was the landlord who was seeking to make the undisclosed principal liable as tenant, not the undisclosed principal who was seeking to establish his rights against the landlord.

(Woodfall, 24th ed., pp. 90, 139; Supplement No. 4, p. 6.)

Rent Restrictions Acts—transfer of burden or liability to the landlord.—By section 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, "any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act".

In *Winchester Court* v. *Miller*, [1944] K. B. 734, there was—

(a) A letting at £195 a year which determined the standard rent, the tenant being responsible for repairs.

(b) A subsequent letting at £165 a year to a tenant who had the benefit of a fair wear and tear clause added to his repairing clause, the burden of doing the residue of repairs being therefore borne by the landlords.

(c) A statutory tenancy consequent upon the latter tenant holding over.

The landlords sought to increase the rent not only up to the standard rent but by a further amount also of £20 a year in respect of their added burden of repairs.

It was contended on behalf of the tenant, and this view was adopted also by Luxmoore, L.J., that section 2 (3) referred only to cases where there was a consensual transfer of liability, for example a tenant responsible

for all repairs agrees to new terms under which part of that liability is transferred to the landlord in exchange for an increased rental which is proportional to that transferred liability so that in the end the tenant is holding on no less favourable terms. In the present case the tenant had come in initially on the terms whereunder part of the burden was undertaken by the landlord, and there had been no transfer of the liability or any part of it during his tenancy. On the restricted view of the sub-section taken by Luxmoore, L.J., the landlord was not entitled to the increase he now sought to make.

A majority of the Court of Appeal, however, consisting of Scott and MacKinnon, L.J., were of the contrary view. It was held by the majority of the Court that the transfer referred to in the sub-section is a shifting of the burden from tenant to landlord no matter when or by whom it has been brought about, provided it is a shifting which has occurred since the letting which determines the standard rent. The terms of the present letting are compared with those of the letting which fixes the standard rent, and if it is found that there has been such a transfer of liability, whether upon a new letting or otherwise, the landlord is entitled to make the increase in respect thereof authorised by the sub-section.

It is interesting to compare this case with *Field* v. *Gover*, [1944] 1 K. B. 200, where it was laid down that any excess which is charged above the standard rent is for the purposes of the Acts an "increase" of rent, though there may never have been any increasing of the rent in the ordinary sense of the word (in that case it was the standard rent which had become less owing to the peculiar operation of the apportionment provisions). Both cases illustrate the operation of the Acts *in rem* and the determination of the lawfully exigible rent as a matter of status as a controlled house under the Acts.

(Woodfall, 24th ed., p. 364; Rent Restrictions Guide, p. 37.)

War damage—multiple lease—disclaimer allowed of part only.—*Re Fitzhardinge's Lease; Mackenzie* v. *Samuel Estates* (1944), 61 T. L. R. 87, provides an illustration of the working of section 15 of the Landlord and Tenant (War Damage) Act, 1939, as amended by the Amendment Act of 1941.

The demised premises consisted of a house together with property in a mews which had during the currency of the lease been converted into two flats and a garage. There was thus a multiple lease within the terms of the Landlord and Tenant (War Damage) Acts. War damage occurred which rendered the house unfit for occupation, but the damage to the flats and garage was only slight and was made good. Afterwards the properties were separately assessed for rating purposes. In due course the landlords served a notice to elect, in reply to which the tenant served a notice of disclaimer of the whole lease accompanied by a notice in writing that she would apply to the Court under section 15 for an order allowing her to disclaim the house but retain the garage and flats. The landlords, wishing to redevelop the property as a whole, opposed the application, contending that she must either disclaim or retain the entirety.

Section 15 of the Act, as amended, provides in relation to a multiple lease that either the person who serves a notice of disclaimer or retention or a notice to elect, or any other person interested in the lease or in the reversion, may within one month apply to the Court to determine whether the tenant shall be allowed to exercise the right of disclaimer or retention either as respects the lease as a whole or as respects one or more of the separate tenements comprised therein, or should not be allowed to exercise

that right at all. If the Court (sub-section (3)) considers it equitable to allow the tenant to exercise the right of disclaimer or retention in respect of the whole lease, it will give effect to the tenant's notice, or allow an extension of time for disclaiming, accordingly. If the Court (sub-section (4)), "having regard to the matters referred to in the last foregoing sub-section, is not satisfied that it is equitable to allow the tenant to exercise the right of disclaimer or retention as respects the lease as a whole, but is satisfied that it is equitable to allow him to exercise the said right as respects one or more of the separate tenements comprised therein", the Court will give directions ordering the lease to be treated as two separate leases, one comprising the disclaimable tenement or tenements and the other the remainder. If on the other hand the Court is not satisfied that it is equitable to allow the tenant to exercise the right of disclaimer or retention at all, it will direct that the land is not to be deemed to be unfit for the purposes of the Act.

In the present case the tenant had, before applying under section 15, served a notice of disclaimer applicable to the whole property. There was no desire on her part actually to disclaim the entirety; the notice appears to have been served for the purpose of ensuring against the consequences under section 4 (4) of failing to serve a notice of disclaimer in reply to a notice to elect; the tenant did not wish to run the risk of having a notice of retention implied by law in respect of the entire property, damaged as well as undamaged. To make her position and wishes clear she accompanied the notice of disclaimer with her notice of intention to apply under section 15. It was contended by the landlords, however, that the only matter for the Court now to decide under section 15 was whether the tenant should be allowed to exercise the actual right claimed in her notice, namely, disclaimer of the whole property, and to this the landlords did not object. Their objection was to a disclaimer of part only, and they contended that on the true construction of the relevant statutory provisions and in the light of the relevant facts the tenant having served a notice of disclaimer which the landlord was willing to accept was precluded from asking the Court to give her a right of partial disclaimer and that the Court accordingly had no jurisdiction to entertain the tenant's application. It was further argued that the Court must proceed by steps to deal with any application which comes before it; that the Court must first under sub-section (3) consider whether it is equitable to allow the tenant to exercise the right of disclaimer or retention (as the case may be) in respect of the lease as a whole; that it was irrelevant at that stage to consider whether it would be equitable to allow the tenant to disclaim in part because that question oculd only arise if the Court was not satisfied that it was equitable to allow the tenant to disclaim as to the whole. In other words the Court, it was argued, had no power to examine the comparative merits from the point of view of equitableness, of total disclaimer on the one hand and partial disclaimer on the other; the Court could only consider the equitableness of total disclaimer and, if satisfied as to that, the only order the Court could make was an order allowing total disclaimer under sub-section (3).

These contentions were rejected by Uthwatt, J., and his judgment was affirmed by the Court of Appeal. It was held as regards the first point that a tenant who has served a notice of disclaimer is nevertheless entitled under the Act to apply to the Court for leave to make a partial disclaimer. As regards the second point, it was wrong to treat the various examinations which the Court is directed to undertake by sub-sections (3) and (4) as being successive in point of time and divided into water-tight compartments. It was impossible for an order allowing total rejection to be equitable if the more equitable course would be to allow the tenant to disclaim in part.

Uthwatt, J., came to the conclusion that this was a case where it was equitable to allow the tenant to exercise the right of disclaimer in respect of the house only, leaving her in possession of the property in the mews and no argument was addressed to the Court of Appeal on this point.

(Woodfall Supplement No. 4, p. 53.)

"Contract of tenancy" within the Agricultural Holdings Act, 1923—*requirement of a twelve months' notice to quit—effective avoidance of the Act.*—In *Land Settlement Association* v. *Carr,* [1944] K. B. 657, the Court of Appeal has had to consider the question what is a "contract of tenancy" within the definition provided in the Agricultural Holdings Act, 1923, and in so doing has disclosed an interesting loophole in the provisions of the Act.

By section 25 (1) of the Act, "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy". By section 57 (1), "In this Act, unless the context otherwise requires, 'contract of tenancy' means a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year."

In this case a smallholding was let for a term from October 1, 1939, to September 29, 1940, and thenceforward from September 30, 1940, for the term of 364 days and thereafter for successive periods of 364 days as from September 29, 1941. The agreement was expressed to be terminable by either party at any time during the currency of the term or any successive period on giving to the other party three calendar months' notice in writing. The avowed intention of the agreement was to get round the provisions of the Agricultural Holdings Act, as these were thought to be inconsistent with the scheme of co-operative farming which the Land Settlement Association wished to establish.

The main issue before the Court of Appeal was whether this form of tenancy constituted a "tenancy from year to year" and thus was a "contract of tenancy" within the meaning of the Agricultural Holdings Act. The Court held, after citation of authorities on the meaning of tenancy from year to year, that it was not. It was undoubtedly a periodic tenancy, but the period was one of 364 days, not a year. It was therefore impossible to describe the tenancy as being from year to year. It followed that the Agricultural Holdings Act did not apply to the tenancy since it was not a contract of tenancy within the meaning of the Act, and the provision for a three months' notice was accordingly valid.

A minor point raised, but one of some interest, was the suggestion that the three months' notice must be given to expire at the end of a period of the tenancy. This contention was rejected by the Court of Appeal. The phrase "at any time" referred to the determination of the tenancy and not to the giving of the notice, and by proper service of a notice of appropriate length the tenancy could be determined at any time during its currency.

The case is of considerable importance, limiting as it does very clearly the varieties of tenancy to which the Agricultural Holdings Act applies. In this case the provisions of the Act were avoided for the purpose of introducing a *bona fide* scheme of co-operative farming, but it is evident that skilful use could be made of the principle discovered in this case to

make a broad inroad into the protective safeguards for farming tenants established by the Act (and see the article on the subject of notices in agricultural tenancies generally, *ante*, p. 64.

(Woodfall, 24th ed., p. 953.)

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4. *DEATH DUTY CASES.*

By LEONARD STEIN, Barrister-at-Law.

Estate duty—life assurance policy—transfer to trustees with provision for payment of premiums—whether policies kept up by deceased—Finance Act, 1894, s. 2 (1) (c).—The decision of the Court of Appeal, affirming, by a majority, the judgment of Wrottesley, J., in *Barclays Bank* v. *Att.-Gen.* (see *The Conveyancer,* December, 1943, at p. 128) has been unanimously reversed by the House of Lords, [1944] A. C. 372. The case turned on the construction of section 38 of the Customs and Inland Revenue Act, 1881, and section 11 (1) of the Customs and Inland Revenue Act, 1889, which, as incorporated in the Finance Act, 1894, by section 2 (1) (c) of that Act, require that the property passing on a death shall be deemed to include " . . . money received under a policy of assurance effected by any person . . . on his life where the policy is wholly kept up by him for the benefit of a donee . . . or a part of such money in proportion to the premiums paid by him, where the policy is partly kept up by him for such benefit ".

In the *Barclays Bank Case,* above, the gist of the somewhat complicated facts was that the deceased had transferred to the trustees of a settlement certain assurance policies on his own life and had also transferred to them certain investments, the trustees being directed to draw upon the income, and, if necessary, the capital, of the investments for the payment of the premiums on the policies. Could it, then, be said that the policies had been " kept up " by the deceased within the meaning of the statutory enactment? Both Wrottesley, J., and the Court of Appeal (Luxmoore, L.J., dissenting) had answered this question in the affirmative. The House of Lords unanimously agreed with Luxmoore, L.J., in taking the opposite view, holding that to " keep up " a policy is to pay the premiums as they fall due; that where a settlement provides for the payment of premiums out of the trust funds or their income, it is not the settlor but the trustee who pays the premiums and so keeps up the policy; that in paying the premiums the trustee is not paying them as the agent of the settlor but in the discharge of his own fiduciary obligations; and that it is immaterial that the fund out of which, or out of the income of which, the premiums are paid was provided by the deceased, since, as Lord Macmillan put it: " You cannot keep up a policy with money which you have already given away ".

It was conceded on behalf of the appellant that the policy moneys did attract estate duty under section 2 (1) (d) of the Finance Act, 1894, which provides that the property passing on a death shall be deemed to include " any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased ".

In this case, however, the distinction between section 2 (1) (c) and section 2 (1) (d) was material, since, had paragraph (c) applied, duty

would have been payable on the whole amount of the policy moneys, whereas the provisions of the settlement were such that duty was payable under paragraph (d) only on the value of a life interest in the policy moneys, this being the extent of the beneficial interest arising on the death.

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5. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Surtax—total income—deduction of annual payments—whether payments effectively made.—In *Russell* v. *C. I. R.*, [1944] 2 A. E. R. 192; 171 L. T. 249, C. A., the salient facts were, in substance, as follows: A father had entered into various covenants for annual payments for the benefit of his children. In some cases the annual sums were payable to trustees, who were given a discretion, during the minority of the child, to pay or apply the whole or any part of those sums to or for the benefit of the child, with power to accumulate any surplus, accumulations to be held in trust for the child absolutely. The trustees were given the usual power to make payments for the benefit of the child to its parent or guardian without being concerned to see to the application of such payments. In those cases in which the beneficiaries were infants, what happened in practice was that the covenantor drew a cheque for the appropriate amount in favour of the trustees (who were partners in a firm of solicitors handling his affairs), and immediately afterwards the trustees, in the exercise of their discretion under the deed, drew a cheque for a like amount in favour of the covenantor as the parent of the beneficiary. In some of the years of assessment in question deductions from total income in respect of these payments were clearly ruled out by section 21 of the Finance Act, 1936, but even in the case of earlier payments made in years of assessment before 1936-37 it was held by Macnaghten, J. (see *The Conveyancer*, March, 1943, at p. 167) that the payments were not effective payments, that they involved no diminution of the father's income and that they were, therefore, not deductible in the computation of his total income. The Court of Appeal has now reversed this decision, it being pointed out by Luxmoore, L.J., in delivering the judgment of the Court, that, although the trustees simply handed over the money to the father with no responsibility for its application, this did not exonerate the father from his liability to apply the money for the benefit of the infant beneficiary. In other words, the money, when paid back to him, did not become his own money but was impressed with a trust in favour of the beneficiary and, there being no grounds for describing the transaction as a sham, the deduction must be allowed.

There were also in question certain other deeds of covenant for the benefit of children who had attained their majority. What happened in these cases was that, payment having been duly made to the child, he then endorsed the cheque and, at the father's suggestion, handed it to him on the understanding that he would take care of the money. In these cases likewise it was held by Macnaghten, J., that there had been no effective payment, but here again the Court of Appeal took a different view and reversed the decision.

Income tax—capital sum to produce clear yearly sum—Finance Act, 1941, *s.* 25.—In *Re Powell, Neale* v. *Roberts*, [1944] W. N. 221, a testator, who died in 1943, had, by a will made in 1938, made a charitable bequest of " such a sum as will produce after payment of tax and all other deductions the yearly sum of £60 . . ." A question having arisen as to the application of section 25 of the Finance Act, 1941, it was held by Vaisey, J., that the capital sum to be set apart must be computed by reference to that section, with the result that it must be such a sum as would, after deduction of tax at the current standard rate of ten shillings, leave twenty twenty-ninths of £60. Accordingly, the required capital sum was a sum which would produce a gross income of £82 15s. 2d.

THE LIBRARY.

Rent Restrictions Cases. Annotated. By LIONEL A. BLUNDELL, LL.M., of Gray's Inn, Barrister-at-Law. Editor of Woodfall's *Landlord and Tenant*. London: Sweet & Maxwell, Ltd., 2 & 3 Chancery Lane, and The Estates Gazette, Ltd., Audrey House, Ely Place, E.C.1. 1944. pp. xxxii and 248. (17s. 6d. net.)

This book is in the nature of a digest annotated of the Rent Restrictions Cases by the learned Editor of the current edition of Woodfall. It is, however, something more than a digest. The facts of the cases as a rule are well and fully set out and the annotations though brief are much to the point and operate to cross reference to other cases, to point the practical effect of the decision and to incorporate other relevant material. The cases are arranged alphabetically, which seems the only practical method, but apart from the annotations there is an analytical table of subject-matter that groups the cases under effective descriptions of the statutory provisions. Furthermore, there is an index to turn up any subject-matter which collects the page references of the cases in another way. Though in the main the effect of the decision is shortly stated in the author's own words, there are a number of useful extracts from judgments.

The result is that anyone wishing to have knowledge of the case law on these intricate and highly technical acts will have here a full and sufficient guide. If only all our case law could be similarly treated it would cease to have any terrors for the practitioner. We heartily commend the work which is in such a reasonable compass that it can be kept always at hand.

BOOKS RECEIVED.

Burke's Encyclopaedia of War Damage and Compensation. Supplemental Part 16 to 18. Hamish Hamilton (Law Books), Ltd.

Burke's Loose Leaf War Legislation. 1944. Parts 9 to 13. Hamish Hamilton (Law Books), Ltd. 6s. each.

McBain's Concise E.P.T. and N.D.C. Second edition. Sweet & Maxwell, Ltd. 12s. 6d.

Newport's Income Tax Law and Practice. Sixteenth edition. Sweet & Maxwell, Ltd. 15s.